No. 3206

United States Circuit Court of Appeals

For the Ninth Circuit.

W. P. FRICK,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

UNITED STATES OF AMERICA,

Complainant,

vs.

W. P. FRICK, JOHN DOE, RICHARD ROE, and ALBERT DOE,

Defendants.

Bill of Complaint.

To the Judges of the Circuit Court of the United States, for the Ninth Circuit, Northern District of California:

George W. Wickersham, Attorney General of the United States, and Robt. T. Devlin, United States Attorney for the Northern District of California, for and on behalf of the United States of America, complainant, bring this bill in equity against W. P. Frick, John Doe, Richard Roe and Albert Doe, all inhabitants and residents of the State and Northern District of California, and hereby made defendants to this bill of complaint, and thereupon your orators complain and say:

I.

That heretofore, to wit, on August 23, 1907, one Bolling C. Robertson, now deceased, under the provisions of the Act of Congress of the United States entitled "An Act for the Sale of Timber Lands in the States of California, Oregon and Nevada, and in Washington Territory," approved June 3, 1878, and the amendments thereof, and under the regulations of the Department of the Interior of the United

States made and filed in the United States Land Office at Sacramento, California, his certain application to purchase all the following described public lands of the United States, situated in the district of lands subject to sale at Sacramento, California: [1*]

> Lots 3, 4, and 5; the southeast quarter of the northwest quarter (SE.¼ NW.¼) of Section Six, township eight north, range fourteen east, M. D. M.

That the said application was regular in its form, and was duly subscribed by said Bolling C. Robertson as applicant, was duly verified by the oath of the said Bolling C. Robertson as applicant before the Register of the said United States Land Office at Sacramento, California, and was duly received, accepted and filed by the officials of the said United States Land Office as and for an application to enter said lands under the said timber laws of the United States; and that at said time a duplicate of said application was by said Bolling C. Robertson duly made, subscribed, sworn to and filed with the said Register of the United States Land Office at Sacramento.

II.

That in the said application, the said Bolling C. Robertson did designate by legal subdivisions, the particular tract of land he desired to purchase, and he did therein set forth among other statements that he had personally examined said land; that the said was unfit for cultivation, and that the same was val-

*Page-number appearing at foot of page of original certified Transcript of Record.

uable chiefly for its timber; that it was uninhabited, and that it contained no mining or other improvements, and that as he, the said Bolling C. Robertson verily believed, the said land did not contain any valuable deposits of gold, silver, cinnabar, copper or coal, and that the Bolling C. Robertson had made no other application under the said Act; that Bolling C. Robertson did not apply to purchase the said land on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he had not directly or indirectly made any agreement or contract in any way or manner, with any person or persons whatseoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself. [2]

III.

That at the time of the filing of the said application for the purpose of perfecting said application said Bolling C. Robertson as applicant aforesaid, further made and filed in the said United States Land Office his certain nonmineral affidavit; that said nonmineral affidavit was regular in form, was duly subscribed to by said Bolling C. Robertson, was duly sworn to before the Register of the said United States Land Office at Sacramento, California, and was duly received, accepted and filed by the officials of the said United States Land Office, and the officers of the said Department of the Interior as a regular and sufficient nonmineral affidavit under the law and the rules and regulations requiring the filing of a

nonmineral affidavit in connection with the making of an application to enter said lands under the said timber laws of the United States. That in said affidavit, said Bolling C. Robertson declared, among other things, that he was well acquainted with the character of said land and each and every legal subdivision thereof; that he had frequently passed over the same; that to his personal knowledge there was not, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead or copper, or any deposit of coal; furthermore, he declared that no portion of said land was claimed for mining purposes under the local customs or rules of miners or otherwise, and that no portion of said land was worked for mineral during any part of the year by any person or persons that said land was essentially nonmineral and that the said application therefor was not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for timber purposes.

IV.

That upon the filing of the said application and said nonmineral affidavit, the said Register of the said United States [3] Land Office, in compliance with law, did give notice that said applicant and affiant had filed in his office his sworn statement and application for the purchase of the land as hereinbefore described, and would, at a time and place fixed in said notice, to wit, the 28th day of October, 1907, offer proof to show that the land sought was more valuable for its timber and stone than

for mineral purposes, and would establish his claim to said land before the Register of said United States Land Office at Sacramento, California, at said time and place; that said notice was in accordance and in compliance with law duly published in a newspaper for the required length of time.

V.

That at the time and place so fixed in said notice for the hearing of said application, the said Bolling C. Robertson, as applicant, did appear as a witness in his own behalf and did produce W. P. Frick, one of the defendants herein, and one Ezra Taylor, as witnesses to testify in his, said Bolling C. Robertson's behalf; that said Bolling C. Robertson and the said witnesses were, by the said Register of the said United States Land Office at Sacramento, California, before whom the said matter was to be heard, duly and regularly sworn to testify truthfully concerning all matters about which they might be questioned, relative to the said application of the said Bolling C. Robertson, and to the character of said land.

That thereupon questions were regularly propounded to the said Bolling C. Robertson and to his said two witnesses, and in answer to such questions at said hearing the said Bolling C. Robertson and his said two witnesses did testify in part, as follows: That the said Bolling C. Robertson had made application for said land; that they were intimately acquainted with said property and every part thereof, and had been over the property and had made a careful examination of the same; that the said land

was not and would not be fit for cultivation; that it was steep, [4] rugged and rocky and thin soiled; that it was unoccupied and unimproved; that there were no indications whatever of any salines, deposits of gold, silver, cinnabar, copper or coal thereon, and that the said land was chiefly valuable for its timber, and that no other person had any interest in said entry, land or timber than himself.

VI.

That the said Bolling C. Robertson did testify and did cause his said witnesses, one of whom being W. P. Frick, a defendant herein, to testify to the said statements last hereinbefore particularly specified; that all of said statements made by said witnesses and said Bolling C. Robertson were, and each of the same was, as the said Bolling C. Robertson well knew at the time he made and caused the same to be made, false; that not only said statements, but also the said declarations of said Bolling C. Robertson in his said application, and his said nonmineral affidavit were false and were made with intent to defraud the United States, and the same did in fact defraud the United States.

VII.

Referring to the said declarations contained in the said testimony, application and nonmineral affidavit of said Bolling C. Robertson, and the declarations in the said testimony of said witnesses, which are hereinbefore charged to have been wholly false and to have been made with the intent to defraud the United States, your orators aver that such declarations were false in this: That the said land has al-

ways been more valuable for minerals than for timber; that for a long time prior to the entry of said Bolling C. Robertson upon said land, and subsequent thereto, and at the time of the purchase of said land by W. C. Frick as hereinafter set forth, there were located on said land gold quartz and placer mining claims owned by one L. Parker of Grizzly Flat, California, the location of which claims appeared upon the records in the office of the [5] County Recorder of El Dorado County, California; that on lot number 4 of said land there are two gold quartz veins exposed and several thousand dollars' worth of mining improvements owned by said Parker. That said improvements owned by said Parker consist of several hundred feet of trenching from ten to twenty feet deep and from twenty-five to one hundred feet wide, and a log cabin in good condition; that leading to said claims there is over a mile of ditching used to carry water to said claim; that samples of said quartz upon being pounded and washed show good profits; that the said land has always been well-known throughout the surrounding community as mineral land; that said improvements hereinbefore set forth and said outcroppings of quartz and mineral indications on said land were on said land and in full view to the human eye on and before the time of the entry by said Bolling C. Robertson and at the time of the issuance of patent to him and have ever since continued to be in existence and in evidence thereon as aforesaid.

VIII.

That the said testimony of the said Bolling C.

Robertson and of his said witnesses was reduced to writing, and that the same was thereupon subscribed and sworn to by the said Bolling C. Robertson and his said two witnesses in the form of affidavits, containing questions and answers in accordance with the rules and regulations of the Department of the Interior of the United States; that after the said testimony was reduced to writing, the said Bolling C. Robertson caused the same to be filed in said United States Land Office at Sacramento, California.

That said Bolling C. Robertson paid the fees required by law and also all moneys required by law for the purchase of said land, and the Receiver then in office did duly and regularly execute to said Bolling C. Robertson a Receiver's receipt therefor, dated October 28, 1907, and did thereby duly acknowledge the receipt of said moneys as being in full for the land above mentioned and described; that said receipt was duly and regularly signed by the [6] proper officer who was then and there the Receiver of the United States Land Office at Sacramento, California; that a duplicate of said receipt was at the said time and place of making the same as aforesaid, duly delivered by said Receiver to the said Bolling C. Robertson.

That said Bolling C. Robertson complied with all the forms of law and the rules and regulations of the Department of the Interior required to obtain a patent to the whole of said land hereinbefore described, under the Act of Congress hereinbefore referred to, and that the said proofs and testimony

offered by him were accepted by and filed with, the said officials of the United States Land Office at Sacramento, California, and by the officials of the Department of the Interior of the United States, as being in all respects regular and sufficient and true, and as establishing the right of the said Bolling C. Robertson to have issued to him a patent to the said lands; and in accordance with the rules and regulations of the Department of the Interior of the United States, the complainant herein, by and through its proper officials, duly and regularly executed and issued upon the 6th day of April, 1908, its patent to the said tract of land hereinbefore described, to the said Bolling C. Robertson, under the Acts of Congress hereinbefore referred to, which said patent purported to convey to the said Bolling C. Robertson the title to the said lands.

That the complainant, and all and each of its officers, accepted said proofs without any knowledge or notice of their falsity, or of the fraud herein set out as aforesaid, and complainant, prior to the issuance of said patent, had no notice or knowledge of said fraud, but on the contrary believed the said statements of said Bolling C. Robertson and his said two witnesses, to be true, and believed that the said application was made in good faith. [7]

IX.

That the said false declarations of said Bolling C. Robertson in his said application and nonmineral affidavit and testimony, and the said testimony of the said two witnesses, were made for the purpose of obtaining, and he did thereby obtain, from the

United States, the said patent to the said land, when in truth and in fact he, the said Bolling C. Robertson, had no right whatever to the land, and had not sought to enter the same for the purpose of securing the timber thereon, but for the minerals found therein, and that said statements that the said Bolling C. Robertson applied to purchase said land for timber, were false and untrue; that all of the said false statements were material and had the same not been made, and had not the same been relied upon and believed to be true by the complainant herein, and by its officers and agents authorized to issue the said patent, the said patent would not have been so obtained by the said Rolling C. Robertson.

X.

That subsequent to the 28th day of October, 1907, to wit, on or about the 22d day of September, 1909, the said Bolling C. Robertson made, executed and delivered to W. P. Frick, one of the defendants herein, a grant, bargain and sale deed of conveyance, purporting to transfer all of said lands hereinbefore described to the said W. P. Frick. That said deed of conveyance was on the said 22d day of September, 1909, duly recorded in the office of the County Recorder of the county of El Dorado, State of California, in Book 73 of Deeds, page 207. That ever since the said execution of said deed of conveyance the said defendant W. P. Frick has claimed and has held the title thereby conveyed to said real property herein described and does now claim to own the same and the whole thereof.

That the said defendant W. P. Frick claims to have

purchased [8] said property and to have received therefor the said deed of conveyance, which deed is the only evidence of title that said defendant W. P. Frick has ever procured from any person whatever.

That the said defendant W. P. Frick lived for a number of years prior and subsequent to the year 1900 in the vicinity of the property herein described; that he was engaged in the pursuit of mining in the neighborhood of the said property; that he has passed and repassed over this property and along a certain road which runs close to said property, for a number of years; that he is now, and always has been, well acquainted with the property herein described and has known for several years prior to the entry of Bolling C. Robertson that there were located on said property the claims of said L. Parker, and that said Parker was mining thereon and that said Parker had improved and was improving the property for the purpose of conducting his mineral operations thereon, and that said property was mineral property. That said defendant W. P. Frick was one of the witnesses produced for and on behalf of the said Bolling C. Robertson at the said hearing before the Land Office officials on the 27th day of October, 1907, aforesaid; that said defendant knew and has always known that the said entry made by the said Bolling C. Robertson was made in bad faith through fraud on the part of said Bolling C. Robertson as aforesaid and that this defendant W. P. Frick became the purchaser of said property in bad faith and that he had full knowledge of all of the equities

and rights of this complainant in and to the said property.

XI.

That the complainant does not know the true names of the defendants John Doe, Richard Roe and Albert Doe, and therefore it sues them by the fictitious names aforesaid, and prays that when their true names are discovered, they may be inserted herein, and this bill may be amended accordingly. [9]

XII.

That subsequent to the execution of said deed to the said W. P. Frick by the said Bolling C. Robertson the said Bolling C. Robertson died in the county of El Dorado, State of California.

XIII.

That the said patent so executed and issued to the said Bolling C. Robertson, deceased, constitutes a cloud upon the title of this complainant thereto, and hinders and obstructs it in its use of said land; that defendant W. P. Frick, notwithstanding the fraud practiced upon the complainant by Bolling C. Robertson, deceased, as hereinbefore alleged, by virtue of said patent and said deed, claims to have some interest in said land; that said claims of said defendant W. P. Frick, are adverse to complainant and are wholly without right; that in truth and in fact the complainant is entitled to the said land and the whole thereof, free and clear of any claim or claims of the said defendant W. P. Frick.

That all of the defendants herein claim an interest in the said patent and said lands, adverse to complainant, but said claim is wholly without right.

XIV.

And lastly, in support of the averments of this bill, your orators beg leave to refer to the aforesaid application of said Bolling C. Robertson, deceased, and to all of the affidavits, papers, documents, depositions, receipts, certificates and proceedings had in the matter of the making of said entry and application to purchase, in so far as the same may relate to the issuance of the said patent, and to the records of the General Land Office of the United States and of the Department of the Interior of the United States, or to certified copies thereof.

Forasmuch as your orators can have no adequate relief, except in this court, and to the end, therefore, that the defendants [10] may, if they can, show why your orators should not have the relief prayed, and may make a full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of their knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged; but not under oath, an answer under oath being hereby expressly waived.

WHEREFORE, your orator prays relief and decree of this Honorable Court that the patent to the land in this bill of complaint described, as issued by complainant to said Bolling C. Robertson, be recalled and canceled; that the money paid to the United States by said Bolling C. Robertson as the purchase price of said land, be forfeited to the United States, and that the defendants and all other persons claiming under them, be forever estopped

from asserting any right, title or interest to said land, and that the land described in said patent and this bill of complaint be declared public land of the United States, and that said patent and said deed be declared null and void; and that this complainant may have such other and further relief as may seem to accord with the principles of equity.

May it please the Court to grant to the United States the writ of subpoena issuing out and under the seal of this Honorable Court, directed to the defendants W. P. Frick, John Doe, Richard Roe, James Doe, Albert Doe, on a day certain to be named therein, to be and appear before this Honorable Court to answer all and singular the premises, and to stand and abide by such other orders, directions and decrees as may be made therein.

GEO. W. WICKERSHAM,
Attorney General of the United States.
ROBT. T. DEVLIN,
United States Attorney for the Northern District of California,
Solicitors for Complainant.

[Endorsed]: Filed Oct. 27, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

[11]

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

UNITED STATES OF AMERICA,

Complainant,

vs.

W. P. FRICK, JOHN DOE, RICHARD ROE, and ALBERT DOE,

Defendants.

(Answer of the Defendant W. P. Frick.)

The defendant W. P. Frick for answer to the complainant's complaint on file herein,—

I.

Denies that all or any of the statements alleged to have been made by the said Bolling C. Robertson and his witness therein named, or either of them, as set out in paragraph V of the complainant's complaint were false. Denies that all or any of the statements, or declarations, or either of them, made by the said Bolling C. Robertson in his said application and his said nonmineral affidavit, or either of them, were false, and were or were made with the intent to defraud the United States, or any other person, and that or that the same did in fact defraud the United States, or any other person.

II.

Denies that the said land has always been more valuable for minerals than for lumber. Denies that for a long time prior to the entry of the said Bolling C. Robertson upon said land, and subsequently or

subsequently thereto, and at or at the time of the purchase of said land by the defendant W. P. Frick, as is in complainant's bill of complaint set forth, there were located on said land gold quartz and placer, or gold or quartz or placer mining claims, or any claims, owned by one L. Parker of Grizzly **[12]** Flat, California, or any other person, the location of which claims appeared upon the records in the office of the County Recorder of El Dorado County, California. Denies that on lot number 4 of said land there are two, or any, quartz veins exposed and several or several thousand or any dollars' worth of mining improvements owned by said Parker, or any other person. Denies that said improvements owned by said Parker, or any other person, consist of several hundred feet of trenching from ten to twenty feet deep, and from or from twenty-five to one hundred feet wide, or any other distance wide, and a or a log cabin in good or any condition. Denies that leading to said claims, or any of them, there is over a mile or any ditching used to carry water to said claim or any claim. Denies that samples of said quartz upon being pounded and washed showed good or any profits. Denies that the said land has always been well known, or at all known, throughout the surrounding community as mineral land. Denies that the said improvements hereinbefore set forth, or any of them, and or said outcroppings of quartz and mineral, or quartz or mineral, indications on said land were on said land and in, or in, full view to the human eye on and before, or on or before the time of the entry by said Bolling C. Robertson and at or at

the time of the issuance of patent to him, and have or have ever since continued to be in existence and in or in evidence thereon as aforesaid.

III.

Denies that there was any fraud of any kind, or any false statements of any kind in any of the proofs presented to the United States Land Office at Sacramento, California, or any other place, in connection with the application for a patent to said lands in complainant's complaint described, or in the granting of the patent thereon. [13]

IV.

Denies that the said Bolling C. Robertson did not seek to enter the said lands for the purpose of securing the timber thereon, but that or that he sought to enter the same for the purpose of securing the minerals thereon, and that said statements that the said Bolling C. Robertson applied to purchase said land for timber were false and untrue, or false or untrue.

V.

Denies that ever since the said execution of the deed in paragraph 10 of complainant's complaint referred to that the said defendant W. P. Frick has claim and has or has and has or has held the title conveyed by said deed to said real property in complainant's complaint described, and does claim or does now claim to own the same and the whole or the whole thereof, and avers that at the present time and for a period sometime prior to the filing of this bill of complaint against the defendant W. P. Frick the said defendant has had no interest whatsoever in or

to the real property, or any part thereof, described in complainant's complaint.

VI.

Denies that he had known for several years, or any years prior to the entry of Bolling C. Robertson, that there were located on said property the claims of said L. Parker, or any other person, and that or that the said Parker was mining thereon, and that or that the said Parker had improved and was or was improving the property for the purpose of conducting his mineral or any operations thereon, and that or that said property was mineral property. Denies that said defendant knew and has or has always, or at all, known that the said entry made by the said Bolling C. Robertson was made in bad faith through fraud on the part of said Bolling C. Robertson, as in complainant's complaint charged, and that or that defendant Frick became the purchaser of said property in bad [14] faith, and that or that he had full or any knowledge of or any of the equities and rights, or equities or rights of this complainant in and to, or in or to the said property, or any part thereof.

VII.

Denies that the said patent so executed and issued, or executed or issued to the said Bolling C. Robertson, deceased, constitutes a fraud upon the title of this complainant thereto, and hinders or hinders, and obstruct or obstructs it in its use of said land. Denies that the defendant W. P. Frick notwithstanding the fraud practiced upon complainant by Bolling C. Robertson, deceased, as is in complain-

ant's complaint alleged, or at all, by virtue of said patent and said deed or deed, claims to have some interest in said land, and denies that said Frick claims any interest whatsoever in or to said land. Denies that in truth and in fact, or in truth or in fact the complainant is entitled to the said land and the whole thereof, or the whole thereof, free and clear, or free and clear of the claim or the claims of any person whatsoever.

WHEREFORE, this defendant having fully answered the complainant's complaint prays that the complainant take nothing as against him by virtue thereof, and that he may have his costs in this behalf expended.

JORDAN & BRANN,
Solicitors for Defendant W. P. Frick.

Rec'd a copy of within answer this Oct. 8, 1915.
JNO. W. PRESTON,
U. S. Attorney.

[Endorsed]: Filed Oct. 8, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [15]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY.

UNITED STATES OF AMERICA,

Complainant,

vs.

W. P. FRICK, JOHN DOE, RICHARD ROE and ALBERT DOE,

Defendants.

Final Decree.

This cause came on to be heard at this term, and was argued by counsel, and

It appearing to the Court that a bill in equity was filed in this court on the 27th day of October, 1911, against the defendants, W. P. Frick, John Doe, Richard Roe and Albert Doe, and that subpoena was duly issued; that thereafter said defendant Frick filed his answer to said bill of complaint, the fictitious defendants having been dropped out, and

It further appearing, and the Court finds that the patent to the following described land, to wit: Lots 3, 4 and 5 and the Southeast quarter (SE. ¼) of the northwest quarter (NW. ¼) of Section 6 in township 8 north of range 14 east, M. D. M., containing 199.26 acres, was fraudulently procured by Bolling C. Robertson with the aid and assistance of the defendant W. P. Frick; that the said Frick is not and was not a *bona fide* purchaser of said land

for value without notice of fraud perpetrated upon complainant, and

It further appearing that on the 23d day of May, 1911, the said defendant, W. P. Frick, deeded the said land to the California Door Company, which was a *bona fide* purchaser for value, and that the cancellation of said patent has become impracticable since said suit has been brought, and

It further appearing that the value of said land at the [16] date of the execution of said deed, was $32.50 per acre, and that the complainant is entitled to the value thereof, and the Court being fully advised in the premises;

IT IS ORDERED, ADJUDGED AND DECREED that the said complainant, the United States of America, do have and recover of and from the said defendant, W. P. Frick, the sum of Six Thousand Four Hundred and Seventy-five Dollars and Ninety-five Cents ($6,475.95), together with the costs incurred in the suit.

Aug. 7, 1917.

WM. C. VAN FLEET,

Judge of the United States District Court, Northern District of California.

[Endorsed]: Filed and entered August 7, 1917. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [17]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 15,388.

UNITED STATES OF AMERICA,
Complainant,

vs.

W. P. FRICK et al.,
Defendants.

Opinion.

Filed July 30, 1917.

J. W. PRESTON, United States Attorney, and ED. F. JARED, Assistant United States Attorney, for Complainant.

JORDAN & BRANN and RICHARD LYMAN, for Defendant.

VAN FLEET, District Judge.

This is a bill by the United States seeking equitable relief on the ground of fraud, alleged to have been committed in the procurement of a patent to certain public lands therein described, under an application to purchase them as timber lands, the substance of the material averments being that the application was made by one Robertson, from whom the defendant Frick [18] purchased; that the fraud consisted in false representations and statements made in the sworn application and in testimony given before the land office by both Robertson and Frick—the latter appearing as a witness

therein, on behalf of the applicant—as to the character and state of the lands, in this: that it was represented both in the application and in a nonmineral affidavit filed therewith and in the testimony given on the hearing that the applicant and witnesses had personally examined the land; that it was unfit for cultivation, but was valuable chiefly for its timber; that it was uninhabited and unoccupied, and that it contained no valuable deposits of gold, silver, cinnabar, copper, or coal, and that there were no mining or other improvements thereon; that these statements and representations were false, and known to the applicant and said Frick, when made, to be false, and were fraudulently made, solely for the purpose of deceiving the land officers of the United States and inducing the issuance of the patent; that it was the fact, and was known to both Robertson and Frick, that the land had always been more valuable for mineral than for timber, and that for a long time prior to and at the time of the entry of Robertson, and the issuance of the patent, and at the time of the purchase of the land from Robertson by Frick, there were located on the land gold quartz and placer mining claims, owned by one L. Parker of Grizzly Flat, the location of which appeared upon the records of the Recorder of El Dorado County, wherein the land was [19] situate, and that on a portion of said lands there were several thousand dollars worth of mining improvements owned by said Parker; that these facts were well-known to the applicant Robertson at the time he made his application and procured his patent,

and were fully known to the defendant Frick at the time he gave his testimony and when he made the purchase of the lands; it is alleged that after the transfer of the lands to Frick, Robertson died, and that Frick has since held the title to said lands and claims the same and the whole thereof, and that the said claim and the patent constitute a cloud on plaintiff's title.

The primary relief asked is that the patent be held void and set aside, and the land restored to the public domain, but coupled therewith is a general prayer that the complainant have such other or further relief as may accord with the principles of equity.

Frick alone answered (the fictitious defendants having been dropped out), denying the averments of fact counted upon as constituting fraud, and alleging that since prior to the commencement of the action he had ceased to have any interest in the land.

The record disclosed that Robertson's application was filed August 23, 1907; that his final proof was made October 28, 1907, and that on November 7, 1907, he made a conveyance of the land to Frick, the deed not being placed of record, however, until sometime after the patent issued, which was on April [20] 6, 1908. It was disclosed at the trial that sometime in 1911, the precise date of which does not appear, defendant Frick had deeded the land to the California Door Company, and that this conveyance was placed of record a short time prior to the filing of the bill herein, which was on October 27, 1911; that this fact came to the attention of the

Government's attorneys for the first time shortly before the trial, but investigation satisfying them that the Door Company was a *bona fide* purchaser for value, they refrained from making it a party, proceeding instead upon the theory that in the event fraud on the part of defendant Frick was shown, vitiating the title as to him, the Government would be entitled, under its prayer for general relief, to recover from him the value of the land, in lieu of a cancellation of the patent.

The case accordingly proceeded upon this theory, and the main questions presented for consideration are, (1) does the evidence sustain the charge of fraud as against the defendant Frick; and, if so, (2) is the Government entitled, in this form of action, to recover the value of the land in money damages as compensation for the fraud through which it has been deprived of its land?

The defendant contends that the only material consideration involved in the question of fraud is whether the land was shown to be more valuable as mineral land than for its timber; that if shown to be [21] chiefly valuable as timber land, which it is claimed the evidence establishes, then the other facts charged as elements of fraud become immaterial and the suit must fail. But I cannot accede to the correctness of this contention—either in the premise or the conclusion. In the first place, I am unable to concur in the view that the evidence shows with any certainty that the land is more valuable for its timber than for its mineral deposits; but if it were otherwise, there are further elements of fraud

charged which may no more be ignored than the alleged misrepresentations as to the character of the land. To be open to application and purchase by Robertson, it was quite as essential under the law that the land should be unoccupied and unclaimed and free from improvements by others, as that it should be of the character represented in the application; the statute requires these several facts to be stated and shown, and it does not undertake to make any distinction as to their materiality to constitute a valid application for purchase from the Government.

In this view, what are the facts as to the alleged fraud? As to the contents of Robertson's application and the nature of the testimony given by him and his witnesses before the Land Office, including the defendant Frick, there is no controversy. Their statements were to the effect that they were intimatly acquainted with the land applied for and every part of it, and had been over the property and [22] made a careful examination of it; that the land was not and would not be fit for cultivation; that it was steep, rugged, rocky, and of thin soil; that it was wholly unoccupied and unimproved; that there were no indications whatever of any salines, deposits of gold, silver, cinnabar, copper, or coal thereon, and that the land was chiefly valuable for its timber; and that no person had any claim, interest or right in said land or the timber thereon other than the applicant himself.

The evidence for plaintiff tended to show that the land in question is located in a highly mineralized

zone where much mining for the precious metals is carried on and has been for many years, and that the land in question has always been well known throughout the community as mineral land; that for several years prior to Robertson's application—some seven or eight—one Parker had both quartz and placer mining claims on a part of the land, which he had purchased from a predecessor and for which he had paid a consideration of some $1,200; his claims were of record in the Recorder's Office of the county wherein the land is located; he had a substantial dwelling on the land, where he lived with his family; that he prosecuted his mining operations on these claims, from which he had made a living for himself and family from the gold extracted therefrom; that there were at least two well-developed veins or ledges on the property; that his mining operations [23] included several hundred feet of trenches from ten to twenty feet deep and from twenty-five to one hundred feet or more wide; and that leading to his claims there was over a mile of ditches used to convey water to them; that these operations and his occupation as a miner were well-known, and that they had continued down to a period coincident with, if not later than, the filing of Robertson's application; that while Parker, at about that time, was absent by reason of sickness, his son was in possession for him; and that they were negotiating for the sale of their rights in the property, which they held at a value of $10,000.

In this connection, Mrs. Parker testified that she handled the gold that was taken out and that on one

occasion in but two days washing they took out over $340.00; that she thought this was after the earthquake or about that time; that they always made a good living from their mining.

The evidence further tended to show that the occupation of the land by Parker and his mining operations were well known to defendant Frick. One Mauk testified that he and Frick were partners in the mining business during at least a part of this period; that they discussed the amount paid by Parker for his mine or claims on the land in question; and that he and Frick rented a monitor to Parker for use in working the mine, Frick being present when the [24] monitor was loaded to be carried to the mine. Mauk further testified that he had been in the mining business about nine years, and that this vicinity was distinctly a mineral country, and that he had operated three or four mines within it, adjacent to this property, and found it profitable.

Mr. Kingsbury, the mineral expert for the Government, who made a careful examination of the land on October 3d and 4th, 1910, testified that there was evidenec of a good deal of work done upon the land; that cabins had been built, excavations one hundred feet wide and two hundred and fifty feet long, long, a couple of shafts dug, and trenches and ditches; that he made an examination of the ground as to its mineral qualities and found a number of "colors" of gold, and was of opinion from his explorations that there were sufficient indications for anyone to make a mine pay. This was the substance

of the evidence in behalf of the Government.

As opposed to this, the evidence on behalf of the defendant was chiefly of a negative character. It was to the effect that the witnesses had examined the land or were more or less familiar with it; that they did not discover any improvements thereon of any present value; that while there were evidences that mining had at some previous period been prosecuted to some extent on one part of the land, there was no work [25] of value or any indications of present occupation, and that they thought the place abandoned. Some of them testified that they saw no cabin or dwelling or evidence of habitation; one or two stated that they saw a cabin but did not investigate as to its being inhabited, as they thought it deserted.

As to the character and nature of the land, the witness Remick testified that he cruised the timber for the defendant and found there were about five million feet; he testified at first that he did not know as to its value, but later, on being recalled, stated his judgment that the timber was worth $10.00 an acre. His evidence as to the mineral character or value of the land was so entirely of a hearsay character that the Court was required to strike it out. The defendant Frick, testifying in his own behalf, stated that he knew positively the land was not mineral land; that he was thoroughly familiar with mining and mining property and had been over this land a number of times—had, in fact, surveyed it; that there were no paying mines in the country; that he considered the land worth about $5.00 an acre as timber land; that

rights further, must resort to an action at law for deceit, wherein defendant will be entitled to a trial of the issues by a jury. Under ordinary circumstances, [28] this would be true, but I do not regard the rule as obtaining in an instance of the present character. The case falls, I think, within the well-recognized exception that where the facts are such as primarily to give equity jurisdiction of the controversy, and that jurisdiction has obtained, if an act of the party charged has made the application of the specific remedy sought impossible or impracticable, the Court will retain jurisdiction to award money damages or give such other relief as may be just in the premises.

Such a case was Cooper vs. United States, 220 Fed. 867 (decided by the Circuit Court of Appeals of this Circuit), which, in the circumstances, is not to be readily distinguished from the present case. There the transfer of the land was made after suit brought but before service, and the bill was amended to bring in the grantee as a party. It appearing at the trial, however, that the latter was a bona fide purchaser for value, and the fraud being established, the lower court awarded a decree against the party charged for the value of the land in damages; and the appellate court held that this relief, being within the issues, was properly awarded under the general prayer.

Another similar case is that of Johnson vs. Carter, (Iowa), 120 N. W. 322, where the Court, in response to a similar objection, say:

"It would be a strange perversion of the spirit which pervades all rules of equity if, when a party, who had been defrauded [29] of his title to land, brings the person who defrauded him into a court of equity upon a demand for rescission of the conveyance, he can divest the court of jurisdiction by showing that he has conveyed the land to an innocent purchaser, and thus compel the injured party to resort to another forum for the recovery of damages."

So, in United States vs. Debell, et al., 227 Fed. 760, 764, it is said:

"While it is true that a complainant may not, in a suit in equity, join a cause of action in equity and a cause of action at law, and that where his cause of action in equity fails on the proof he cannot recover damages or moneys that he might have recovered at law, it is also true that where the proof sustains the cause of action in equity, but the defendant has by his course of conduct rendered the appropriate relief first sought ineffective, the chancellor may require him to make compensation for his prevention of that relief. Where the primary relief sought is the restoration of property and the defendant has placed it beyond his and the court's reach, the court may require him to pay the value of the property, or the proceeds he received from it, because the right to this relief inheres in and grows out of the equitable cause of action which the plaintiff has established. . . . . If therefore, the proof established the plaintiff's

cause of action in equity against the defendant for the restoration of the land, he cannot escape accounting for the proceeds he obtained for the property, or the value thereof, on the ground that he placed the land itself beyond the reach of the court."

Moreover, in this instance there would be little justice in requiring the plaintiff to bring an action at law. The defendant was made aware early in the trial of the theory upon which the Government was proceeding as to the relief sought, and made no motion to dismiss or any suggestion as to a desire for a jury trial, but proceeded without objection to a submission [30] of his evidence. Under the circumstances, I think his present contention comes too late.

Within these principles, I think the Government entitled to recover, under its prayer for general relief, the value of the land of which it has been deprived through defendant's fraud.

The only question remaining is as to the measure of the damages to be awarded in relief. The defendant contends that this may not exceed the price at which the land was sold by the Government—$2.50 per acre—and in that regard relies upon the provisions of the Act of March 2, 1896 (29 Stat. at L. 42, 43), entitled: "An Act to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes"; but an examination of the provisions of that act will disclose that it has no application to a case of this character, but deals solely with the rights of bona fide purchasers in instances where the patent

has issued erroneously. It does not affect cases proceeding like the present, on the theory of fraud in the procurement of the patent. In cases of the latter character, the principle has always been enforced that one guilty of fraud upon the Government is not to be permitted to benefit by his misdoing; that having deprived the Government of property to which it is entitled, the latter may justly claim the return of the entire value of that of which it has been deprived. That was, as will be seen, the measure of damages sustained by the Circuit Court of Appeals in Cooper vs. United States, *supra,* and is [31] implicitly recognized as the proper measure in the other cases cited.

Under this rule, it appearing that the defendant has sold the land in question, which he acquired in wrong of the Government's rights, for the price of $32.50 per acre, I am of opinion that that figure should be the measure of the Government's recovery. Let a decree be entered accordingly.

[Endorsed]: Filed July 30, 1917. Walter B. Maling, Clerk. [32]

In the United States District Court for the Northern District of California, Second Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

W. P. FRICK et al.,

Defendants.

Statement of Evidence to be Included in the Record on Appeal.

Be it remembered that on the 9th day of May, 1916, the same being one of the juridical days of the regular May, A. D. 1916 term of the District Court of the United States, in and for the Northern District of California, Second Division, sitting at San Francisco, California, the above-entitled case came on for final hearing before the Honorable William C. Van Fleet, Judge of said Court, the plaintiff appearing by Ed. Jared, Esq., its attorney, and the defendant W. P. Frick appearing by Jordan & Brann, his attorneys, and thereupon the following proceedings were had, to wit:

And thereupon, the plaintiff, to maintain the issues herein on its behalf, offered and gave in evidence as follows, that is to say:

The plaintiff introduced in evidence the proof which was taken before the Sacramento Land Office on the issuance of the final receipt to the entryman, Bolling C. Robertson, and also his application to purchase the land herein involved, which was in the words and figures following:

(Here insert.) [33]

Testimony of J. W. Kingsbury, for Plaintiff.

J. W. KINGSBURY, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

I am mineral inspector for the United States General Land Office. My profession is mining engineer and geologist. I have been with the United States

(Testimony of J. W. Kingsbury.)

General Land Office since May, 1909. I received a bachelor's degree pertaining to mining engineering in 1903, at the University of Utah. In 1907 I received a master's degree from the Columbia University, where I took courses in geology, mining and metallurgy, specializing in geology. During the summers of 1901 and 1902, I worked in the mines at Park City. From 1904 to 1905 I worked in mines in Utah, in Gold Mountain and Bingham. After leaving Columbia I worked in Nevada, in Mexico and in Utah. I made an examination of the property described here, Lots 3, 4 and 5 and the southeast quarter of the northwest quarter of section 6, in township 8, Range 14, E. M. D. M., containing 199 acres on October 3 and 4, 1910. I found that there were outcrops of diorite and porphyry, that there had been considerable work there; there were two shafts, from 10 to 12 feet deep, in diorite, showing some quartz veins. There was also considerable placer work done. All of this work was on Lot 4, except the placer work, which started in on the south end of Lot 5 and ran north on to Lot 4. On Lot 4 there was quite an excavation. As I remember it, it was something like 250 feet long and 100 feet wide. It was placer work, where they had washed out the gravel. It was where they were working to get the gold, where mining work had been done. I remember two shafts. They were from 10 to 12 feet deep, in diorite, showing small quartz veins.

Q. Were there any cabins on the place?

A. Yes, there was one cabin. The cabin was in

(Testimony of J. W. Kingsbury.)

good condition, although it must have been several years old. The mining work had been done there [34] three or four years.

Q. Would you say that it was before or after the 28th of October, 1907?

A. I would be of the opinion that at least some of the work was before that, and that the cabin was built before that.

Q. Just state to the Court what mineral properties you found, and what value you considered it.

A. I was with a Mr. Murray at that time, and we did some panning in the trench on the southeast corner of lot 4, where we found a number of colors of gold in the pan. While we were not on bed rock, it was my opinion from finding that gold there that there was sufficient indication for a man to go ahead and develop the land with expectation of making it pay.

Q. You say, then, from just panning, you came to the conclusion that it would be worth working, that it was valuable mineral land? A. Yes, sir.

Q. Did you make any other examinations in the vicinity of this property?

A. I went over the property, but I did not make any examination of other property in the vicinity.

Q. Did you make any other test on this land besides that you have just spoken of?

A. No, I don't believe I did.

Q. Did you examine any quartz rocks?

A. I don't recollect whether I examined the quartz or not.

(Testimony of J. W. Kingsbury.)

Q. Did you see, in the vicinity, any other indications of mining?

A. Below the land, that is, half a mile to the south there had been considerable placer work done.

Q. You did not make any examination of the gravel? A. No, sir.

Cross-examination. **[35]**

Q. (Mr. BRANN.) Have you ever done any mining in California at all?

A. I never have worked in any placer or other mines in California; I have in Nevada and Utah. I have never done any placer mining, except examination of placer mines in California.

Q. Would you be willing, with these colors you say you got with Mr. Murray, to spend your own money in the development of this property?

A. Well, if I had the money to spend, I think I would.

Q. You think you would? A. Yes, sir.

Q. You base that on the fact that you have not had any experience in placer mining, but simply from your general mining knowledge?

A. From my general mining knowledge, and from the examination of other places.

Q. Have you ever studied the mining formation of this country, where this property is situated?

A. Yes, to some extent.

Q. Have you read the United States Geological Reports on it? A. Yes, some of them.

Q. Did you ever hear of the Plymouth Quadrangle? A. Yes.

(Testimony of J. W. Kingsbury.)

Q. Are you familiar with the report so that you could tell his Honor what the geological report is? First, I will ask you is this property in the Plymouth Peak quadrangle?

A. It is in the Pyramid Peak quadrangle.

Q. The Pyramid Peak quadrangle? A. Yes.

Q. Have you read the reports of the United States Geological Survey on this sufficient to tell his Honor whether this country up there is considered to be mineral bearing? A. I believe it is.

Q. I am not asking that you believe about it—

[36]

The COURT.—He is answering your question; you asked him if he read enough of the United States Geological Survey to be able to say, and he says he thinks it is.

Q. (Mr. BRANN.) Did you examine around about this land for any other mines, or mining, other than what you have testified to?

A. Just what I stated. I examined the Pyramid Peak quadrangle and the folio. As a matter of fact, I have it with me; I will show it to you if you wish me to.

Q. No, I don't care about it.

A. As I recollect it, there are a number of things shown in that Pyramid Peak right around there.

Q. Did you see some timber on this land?

A. Yes, there was some good timber on there—it was a timbered country.

Testimony of G. M. Mauk, for Plaintiff.

G. M. MAUK, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

I live in Eldorado County. I know about the property that was called the Parker mine out in that country. I think it is in section 6, 8 north, range 14 east. I think the last time I was on that place was in 1902; I am not sure whether it was 1902 or 1903, but I rather think it was 1902; that is my recollection. Mr. Parker and his wife were living there.

The last time I was there, when Mr. Parker was running this tunnel, he brought out a pan or two, and panned it out in my presence; there was some gold in the pan, but I cannot recollect, because I was not interested. I didn't pay particular attention, but enough to know that he had some gold in the pan. [37]

I know Mr. W. P. Frick. We were at that time in mining. Frick and I talked about Mr. Parker buying the mine of those parties, and the $1,000 price that we were informed that he paid for it.

Q. Do you know whether Mr. Frick was familiar with this property?

A. He was to some extent; he was with me there at one time after Parker bought the mine, and I think probably passed over the ground, but probably not right by the mine, two or three times. My recollection is there was a house on there when Mr. Parker first bought the mine, a small house, a cabin. There were ditches to the mine. I have followed mining as a business. The vicinity in which the

(Testimony of G. M. Mauk.)

Parker mine is located was known as a mineral region. The gravel in the Parker mine was very similar to that from where I was mining. I did mining a mile and a quarter from this property. The first mining I did was on what we call the Star gravel mine, in sections 27 and 28, township 9, range 14 east. I should judge it was about two miles from this property. We put in our plant 1,500 feet of pipe, and worked one month, and we cleaned up $1,800 with a small monitor. That was the first year's mining. Mr. Frick and I mined there the following year, in 1901.

Q. Have you examined any of the gravel around the Parker Mine? A. I never did myself.

Q. When was that mining done within half a mile of the Parker mine that you have spoken of?

A. Most of that was done before I commenced mining in that locality.

Q. You say that you and Mr. Frick were partners at one time; now, during the time that you were partners, I want you to state if you and Mr. Frick at any time ever loaned Mr. Parker any tools, or anything to do any mining with.

A. We loaned or hired him our monitor and as much of our pipe as he wanted. Mr. Frick was present when we loaded it on a wagon and hauled it over there. It was going to Parker's mine. [38]

Cross-examination.

Q. You say you were down there in 1902 the last time; is that right?

A. I think that is right. Parker was then run-

(Testimony of G. M. Mauk.)

ning a tunnel in the hill.

Q. Do you know whether or not there was any ground-sluicing done on the property?

A. In the canyons below that, where it breaks off near where he started the tunnel, it was mined there before Mr. Parker got the property.

Q. It had been ground-sluiced out before that?

A. Down lower in the canyon.

Q. When were you through there the last time?

A. It was either in 1902 or 1903.

Q. And at that time there had been mining workings on it?

A. Yes, prior to that time; that ditch was built years before Mr. Parker purchased this mine—it was an old ditch, or a portion of it was—I have crossed over it many a time.

Testimony of Ellen C. Parker, for Plaintiff.

ELLEN C. PARKER, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

I have no permanent home; I live with my daughters. At one time I lived upon a mine that was called the Parker mine. That was my husband's; he had it and I was up there with him. That is all the home we had—I gave up everything and went up there with him on the mine, and he built the cabin himself in Eldorado County. I stayed there most of eight years and more.

Q. Do you recall the year you left there?

(Testimony of Ellen C. Parker.)

A. I don't remember what year I left. He was sick.

Q. Was it before or after the earthquake?

A. It was after the 1906 earthquake. We owned it at that time. We owned it all the time.

Q. Who did Mr. Parker buy it from?

A. I couldn't tell you; I think there was a man named Jones and young Mr. Meyer; he bought of them. I know he paid about $1,200, $1,200 or $1,300. [39] We made our living from the mine for the eight years that we lived there. We had a good many hired men, because the ditch that he first dug broke before they got much out of it. A nephew of his came there and his own two boys, and they dug another ditch that went around another hill; it did not bring them out as much as when they washed into the first canyon where they got the gold. When we came back to that old place, in one or two days' washing they took out over $340. He built the cabin for me to come up to. It was a nice good cabin, and with a cellar to put our provisions in. He dug a well and we had a garden. He bought a pump. There was no timber claim put on the ranch at all. My husband died three years ago last January. He was the miner; he had too much ambition.

Cross-examination.

We first went on this property about two or three years before the San Francisco fire; he went there in 1902.

Q. When did he take the gold out of there, before

(Testimony of Ellen C. Parker.)

the San Francisco fire or afterwards?

A. Before, the most of it. The first *first* he dug worked, it paid well. That ditch broke. Then when they went hydraulicking from the other ditch they put in around the other hill it did not pay them well. He dug tunnels, but he didn't get any pay out of the tunnels. It was out of the same ravine that this big lot of money was taken out at the foot of our canyon. He was hydraulicking in the bank of the creek.

Q. It was the hydraulicking that he got his money out of? A. Yes, sir.

Q. And that hydraulicking, most of it, was done before the fire? A. Yes, sir. [40]

Q. The $300 you have told us about, that was gotten out before the fire?

A. That was after the fire. There was a good deal of timber on this property, not as much on the place where we got the gold.

Q. Was it good timber land?

A. Yes, good timber land, near our cabin were 7 or 8 big yellow pine trees. The water that came in the ditches Mr. Parker dug came from Mrs. Parson's ditch. Mrs. Parson's ditch was there when I went there. My husband made a ditch from Mrs. Parson's ditch and let the water come down so he could ground-sluice. The water that he had done his hydraulicking with came from Mrs. Parson's ditch. There was a Government surveyor there. The first two or three years we went up there we stayed there; but after that I only stayed

(Testimony of Ellen C. Parker.)

while we could hydraulic. Mr. Parker stayed all the time; he prospected.

Redirect Examination.

My husband left up there after the fire; he was sick.

Testimony of Antone Meyer, for Plaintiff.

Mr. ANTONE MEYER, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

In 1889 I located up in the mountains and then I sold my timber and since then I am in the hotel business. I know about the Parker mine; Mr. Parker was living there, and made his living from his mine while he was there; there were two little cabins on the ground. I could not tell in what year it was. When I was down the last time, Mr. Lee Parker came in with some rock while I was there. I looked at the rock; we went down to the ground and we looked at it. He made his living while he was there. I could not tell exactly how long he was there. I did mining adjoining the Parker claim, and the vicinity in which the Parker claim is located is known as mineral lands. [41] I knew W. P. Frick and part of his business at this time was buying and selling to the California Door Co. timber lands.

Cross-examination.

On this land there was some yellow pine. I went over there to see Parker; he was prospecting.

Q. Do you remember whether any of the land had been ground-sluiced out at that time?

(Testimony of Antone Meyer.)

A. There was a big cut below and they had pipe laying there. It is a good many years since I was over there, but I could not tell how many years it was.

Testimony of F. A. Mergurre, for Plaintiff.

F. A. MERGURRE, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

I am the secretary of the California Door Company. The company purchased the land in suit from W. P. Frick. The check was given on May 25, 1911, at $32.50 per acre.

Plaintiff rests.

Testimony of J. E. Remick, for Defendant.

Mr. J. E. REMICK, a witness called on behalf of the defendant, after being duly sworn, testified as follows:

I have been a timber cruiser since 1902 and before that I worked in mines of all kinds, and am as generally familiar as the average layman is with mining matters. I know the 200 acres of lands that is involved in this suit. I was on that land May 5 and 6, 1916—I cruised the timber on it. There was about 5,000,000 feet of timber on the 200 acres. It is good timber [42] land for that neighborhood—it runs about 25,000 feet to the acre. The timber on the land is the ordinary species of that locality—California white fir, some sugar pine, the red firs, or as they locally term it spruce—white fir and some cedar.

(Testimony of J. E. Remick.)

Q. When you were up there did you look at the mining work that had been done on the land?

A. I saw some evidence of it.

Q. Tell his Honor in a general way what you saw and what this work was.

The COURT.—When was it?

Mr. BRANN.—The 5th or 6th of this month (May, 1916), your Honor.

The COURT.—It would not have any effect on my mind at all, what he saw at that time. I am not going to determine its mineral development or its value as a mine by what the witness may have seen there in May or April of this year.

Mr. BRANN.—May I ask him if there were prospect holes there?

The COURT.—You can ask him anything you please, and if there is an objection I will rule on it.

Q. (Mr. BRANN.) Will you state whether or not you saw prospect holes on this land at that time?

A. I did.

Q. What was their condition?

A. The prospect holes were kind of caved in, they were not in good condition.

Q. Was there any evidence of ground-sluicing having been done on the property?

A. There was evidence of some form of washing—either ground-sluicing or piping.

Q. Where was this ground-sluicing shown?

A. In lot 5.

Q. Was there a ravine there?

A. It had been a ravine, or a swale.

(Testimony of J. E. Remick.)

Q. State how much of the area of the land was taken up by this?

A. About an acre and a half. [43]

Q. From your knowledge of mining and minerals, would you consider this to be mineral land?

A. I would not take it up as mineral land.

Q. Just tell the court why?

A. We did some panning with no results, no prospects, no gold.

Q. (Mr. JARED.) How is that?

A. We panned some of the surface dirt along this excavation where they piped it, and we did not get a color.

Q. (The COURT.) Well, what were you doing there panning at that time?

A. I was panning.

Q. Were you preparing yourself as a witness?

A. I was.

Q. You went there to cruise the land as to its timber value, did you not? A. Yes, sir.

Q. Did they ask you to pan the gravel on the surface to find out whether there was any prospect there? A. Did who ask me?

Q. Whoever sent you there?

A. No, they did not.

Q. How did you come to do it?

A. I was in company with a mining engineer; I ran out the lines and located this work, and I was with this mining engineer who was doing the panning.

Q. How did you come to do any panning? You

(Testimony of J. E. Remick.)

went there to cruise the land.

A. I was just explaining to you that I was in company with Mr. English and he suggested that it would be better to pan some of the dirt; he was sent there as a mining engineer and inasmuch as I was with him I naturally assisted him in panning it.

Q. (Mr. BRANN.) Did you notice whether in these placer excavations there was any growth of timber?

A. There was some small second growth timber, some alders and willows.

Q. About how old would you say they were? [44]

A. I think in Lot 5 there would be timber perhaps 20 or 25 years old; in Lot 4 the timber was of a more recent growth.

Q. 10 or 12 years old maybe?

A. I would think there was some twelve; maybe some of it would look to be 6 or 7.

Q. What do you base your opinion as to that—how do you arrive at that?

A. By the size, the height, the diameter.

Q. Did you look to see if there was any quartz outcropping on this land?

A. I made no particular examination to see. I saw some quartz outcroppings.

Q. Can you tell from your own information about quartz as to whether it is mineral bearing, or not?

A. That is hard to say you know without an assay, but the quartz looked of very poor character.

The COURT.—Such evidence as this is absolutely valueless to my mind. He made no prospect in that

(Testimony of J. E. Remick.)

direction. I would not pay the slightest attention to it, Mr. Brann, and therefore it is idle to introduce the testimony. If this witness had gone there for the purpose of making prospects and examining ore-bearing rock that would be a different thing, but he just passed along and casually noticed some outcroppings.

Q. (Mr. BRANN.) Did you notice whether or not there was a ditch around this property anywhere?

A. There was a ditch north of the property and across the corner of lot 4.

Q. (The COURT.) Lot 4 is part of this tract?

A. Yes, Lot 4 is where most of this work was located.

Q. (Mr. BRANN.) Did you observe any cabin upon this land?

A. There was two cabins.

Q. What was their conditions?

A. Both in disuse and delapidated condition.

Cross-examination.

In 1907 the timber would have cruised practically the same. [45] There is naturally some growth. Any live tree will put on some growth, in diameter and growth. I have cruised timber since 1902 for The California Door Company, the Curtis-Holbrook Company, T. B. Walker and the Mendocino Lumber Company.

Q. Do you know what timber was worth back in 1907? A. I do not.

Q. You don't know anything about its value?

A. I don't know what it is worth there.

Testimony of W. P. Frick, in His Own Behalf.

W. P. FRICK, a witness called on behalf of the defendant, after being duly sworn, testified as follows:

I am the defendant in this action. I was one of the proof witnesses on the application of Mr. Bolling C. Robertson, to purchase this property from the Government in October, 1907. I had been over the property a year or two before I was a witness. The last time I had been over it was just prior to Mr. Robertson's final proof. I found the section corner between townships 8 and 9—12—and 8 and 9—13, which corner is the northwest corner of this particular land. I followed that section line and ran south on it and got down to the section next, the southwest corner of section 6; I came over the quarter stake on the south line of this section and ran north then to the quarter stake, taking in both sides of this property, the east and west sides. That was just a short time before Mr. Robertson had made his final proof, I ran through there for the purpose of ascertaining whether it was timber land.

Q. Have you had any experience in the matter of mining?

A. Yes, I had some experience in that locality and elsewhere. I am familiar with timber lands.

Q. From your examination of this land as you made it at that time, what is your opinion as to whether it is mining land or timber land?

A. I know positively that it is not mining land. I know that in that section of the country there are

(Testimony of W. P. Frick.)

no paying mines in there. Mr. Muck and myself tested that out in the immediate vicinity, in the same class of territory; I proved conclusively that there could be developed no mines. **[46]**

The land is timber land. It is covered with a good growth of timber, a very good average for that district, running in the neighborhood of 25,000 feet to the acre.

There were no mines in that vicinity that would pay. The gulches had been mined out in the early days by the old miners all through there by placer methods and ground sluicing and so on.

At the time I went over and examined this land I made an estimate of its timber sufficient to satisfy myself. I judged it to carry about 25,000 feet to the acre. It consisted of pine and white and red fir and cedar and a little sugar pine.

I did not get Robertson to locate the land. Mr. Robertson knowing my familiarity with the country and knowing that I had known the land in that district asked that I be a witness for him. He was a very fine old gentleman who dealt in lands and real estate; he lived in Oakland at the time that I first met him. I think I paid Mr. Robertson about $5.00 an acre for the land a short time after he got title to it.

In 1902 Mr. Muck and myself mined in that vicinity. It proved a failure. We did not make any money out of it. I satisfied myself at that time that there was no mineral in that district in paying quantity.

(Testimony of W. P. Frick.)

Cross-examination.

I testified at the time that I was a proof witness, that there were no improvements on the property. I did not know at that time that there was a house upon the property—I didn't know there had been any shaft sunk on the property and I didn't know that Mr. Parker was living there. So far as I know it was unoccupied. There may have been a cabin in a gulch there and you would not see it. I didn't know that there was a cabin there. [47] There were no indications of deposits there, no indications of value that I saw.

Q. Is it a fact that you and Mr. Muck lent Mr. Parker a pipe and a monitor to work the mine?

A. We evidently did. It has passed out of my memory. If we did I did not know they went on this property. I was not familiar with it at the time; it was quite a distance.

Q. Didn't you and Mr. Muck discuss the price that Mr. Parker paid for this mine?

A. We probably did. That has passed out of my recollection; I did not know that it was on this property.

Q. It was out of your recollection in 1907 when you were a proof witness to, was it?

A. Oh, yes, I didn't know it was on this property.

Q. You deeded this property, I believe, to the California Door Company? A. I did.

Mr. Robertson did not live up in this country. He went up there fishing and went around. He knew the lands generally. He went up there quite a bit

(Testimony of W. P. Frick.)

so I was told. I did not suggest to him that there was a nice timber tract up there that he could make application for and make an entry. I did not talk to him about it before he made the entry. He knew that I was in the timber business. He was a man who was familiar with lands generally. Robertson made his final proof I think October 28, 1907 and I bought the property about 9 or 10 days afterwards. The deed was recorded September 29, 1909, nearly two years later.

In buying lands in any district it is always our practice not to give notice to the public that we were buying lands because if they knew we were buying lands they would raise the price on us. It is our practice to purchase timber lands without letting the public know it. You can make your tranactions better. The deed was introduced in evidence, marked Plaintiff's Exhibit 2. [48]

I met Mr. Robertson in Oakland the first time in the summer of 1906; he was then a real estate dealer. He had presented some timber land to me, he was buying timber at that time. He was an agent for Mr. Jacobi at that time. He had an office in the same building I was in. I happened to become a witness for Mr. Robertson as follows: As I remember the transaction now Mr. Robertson asked me if I would not be a witness, that he had found some land that was vacant in Eldorado County when he was up there fishing. He said he had one witness living in that country. He asked me if I could not act as a witness for him and I said certainly I would. I

(Testimony of W. P. Frick.)

knew the land when he described it to me at that time because I was familiar in that district, I was very happy to act as a witness for him.

Q. And when did you first speak to him about purchasing this property?

A. He came to me shortly afterwards. Mr. Robertson was then failing.

It wasn't understood between us that I was going to buy this entry after he had gotten the title to it.

The country is brushy and you cannot see a small cabin. We cruise timber in a general way; I cruise timber running down these side lines.

I knew there had been prospecting done in that district, in that altitude all through the Sierra Nevada Mountains there has been more or less prospecting done but nothing valuable found. It is in very rare cases that any mineral has been found in paying quantities such as is known by all reputable mining men.

This suit was commenced October 27, 1911—the suit was commenced after the transfer to the California Door Company.

I had surveyed this property in about 1904. [49]

Q. And you did not see at that time any indication of mining there, I believe you have stated?

A. Yes, evidently there was some abandoned cuts that we would run into occasionally which you find all through that timbered country, early day prospecting. In running this line south, as I remember I ran it, I could see no improvements there.

We did not consider old abandoned mining cuts as

(Testimony of W. P. Frick.)

evidence of any improvements. I was cruising the timber and I was looking at the timber going through there at that time.

If I had seen the cabin it is a good many years ago, I don't know whether I would pay any attention to it as there were little old shacks through that country, used by old miners who had prospected through that country. Mr. Robertson was familiar with different parts of this country as he had informed me that he had gone up there fishing and hunting. I think he told me he used to go over to Amador County and go down there.

Redirect Examination.

Q. Mr. Frick, did you ever do any mining on this property? A. No.

In cruising timber it always has been my method of staying close to the lines, the township and section lines, and making the cruise from there. We go over the section lines and if we happen to be at a place we cannot see so well we walk out and make a general estimation. At that time we did not make such close cruises, and I did not make such a close cruise because I was not interested in the country at that time; we had made a general run through there to look it over.

Mr. Robertson came to me shortly after he made his proofs. He was sick; his physician had stated that he had Bright's [50] disease and he could not live very long. I remember at the time he made his proof there at Sacramento he was failing very rapidly. A short time after that he came to me and

(Testimony of W. P. Frick.)

said, "Mr. Frick, I would like to have you buy that land." I said, "Mr. Robertson, it will depend a great deal on what you will sell it for, because it is rather isolated at the present time for timber land and I would probably have to hold it sometime before I could sell it,"—"Well," he says, "I don't know who I could sell it to unless you would buy it." He finally made a price that was a sufficient inducement for me to risk purchasing it at that time, and I purchased it.

Testimony of Dr. J. C. Anthony, for Defendant.

Dr. J. C. ANTHONY, a witness called on behalf of the defendant, after being duly sworn, testified as follows:

I knew Mr. Lee Parker, Sr. I met him first in San Francisco, sometime before the 1906 fire. I visited the land that he had in Eldorado County where he claimed he had a mining claim with a Mr. Holbrook and a Mr. Chappell. We found some prospect holes. The property had been represented to us as being mining property and we agreed to purchase it if it was as reported.

We found absolutely nothing there to warrant the purchase of the property. His son was there on the property and had a Little Giant at work there and was barely making a living. The samples and things that came through Mr. Chappell who remained on the property did not show any values at all. There were absolutely no earmarks of a mine anywhere. The only thing was the little sluicing he was doing

(Testimony of Dr. J. C. Anthony.)

down in a gulch. It was in 1907, I think in February.

Cross-examination.

I have paid about $100,000 for my information in mining. [51] I was born and raised in mines; my father was the original discoverer of copper on Lake Superior.

The boy was barely making a living there—that is what he said—I did not see his clean up. The father represented he had 220 acres of land running through from the middle fork of the Consumnes over into a creek; when we asked to be shown this land the son absolutely refused to go beyond 80 acres; he said his father did not own anything beyond 80 acres. When we came back to Sacramento we stopped at the Land Office and found that that was true. It was a mining claim in his name—that was in 1907.

There was one cabin with three rooms, and a big fireplace. There was another cabin he said he had built for another property but not on his land—it was in a little depression there. The cabin was not more than 200 or 300 yards from the mining.

Mr. Parker asked for this claim $10,000—it was not worth the trip that we paid going up there. The only thing that was of any value that we could see was what timber there was on it. There was some very good timber on it. I would not call it an extra good purchase for timber, but there was some good timber on it.

Q. This hydraulicking, was there a good deal of it done there at that time?

(Testimony of Dr. J. C. Anthony.)

A. No, that was the only thing that was working.

Q. Did you see any values there that attracted you at all, placer or otherwise?

A. None whatever. We turned the property down flat. The land was not such as would warrant us in spending any money as miners in developing it. We went over all the property where he told us that there was any mining developments and did panning—there was no indication there, there was no [52] lead, there was nothing there that any mining man would want. We brought samples back. I think we only panned in three places—all the places he showed us and that he claimed to be mining property. Those samples didn't show anything—a few cents—none of them went 50 cents a ton.

It was the quartz, it was the quartz that Parker laid so much stress upon. He said he had property there that contained platinum. We brought some of the samples down that he said there was platinum in, but we proved there was nothing in it--this was in 1907 I think in February. The son was working there—he said he had not been there a great while at the time.

Testimony of Ezra Taylor, for Defendant.

EZRA TAYLOR, a witness called on behalf of the defense, after being duly sworn, testified as follows:

I am one of the gentlemen who was a proof witness for Mr. Robertson on the land involved in controversy here. Have lived at Plymouth, Amador County, about 25 years. I first met Mr. Robertson fishing on the river up there, in this neighborhood,

(Testimony of Ezra Taylor.)

about six months before I went down to Sacramento as a witness.

I know the property in controversy here. I have known it off and on for twenty-five years. I have passed over it and I have mined around in this vicinity. I was last on the property in the year 1907, about a week before Mr. Robertson proved up, with Mr. Robertson.

Q. Did you see any mining improvements on it when you went over there?

A. There had been some mining done there, yes.

Q. Was anybody mining on it when you went over it? A. No, sir, I did not see anybody.

Q. Do you know whether there was anybody mining there? A. There was nobody mining there. [53]

Q. What was the nature of the work that had been done on this property, as near as you can tell us at this time?

A. It looked like it had been ground-sluiced, a good deal of it. There was one place there where they had worked a cut up there, and it had caused a landslide, which slid a lot of ground out, and I think, from the looks of it, the high water had washed it more and caused it to look like quite a bit of mining had been done there, but I think it was mostly from the slide. There was an old unoccupied mining cabin there. I did not go in the cabin. It did not look as if there was anybody in there. It was a small house. I just supposed it was an abandoned cabin.

Q. You heard the testimony in regard to this cut

(Testimony of Ezra Taylor.)

that they tell about. Is it on this land?

A. There is a cut on the land.

Q. The tunnel and cut that the witnesses spoke about this morning, do you know whether it is on that land or not? A. I don't think it is.

Prior to 1907 I had been over this land—I was on it every year off and on at different times.

There had been some mining in that gulch at different times. I think they usually mined there in the spring of the year on account of the water, because the water usually gives out about the first of June. Of course, it depends on the condition of the season, how much snow there is, and so on, as to how long the water holds out, but I think the most of the mining down in there was done in the spring. I think a man named Keyes mined in there at one time. I think he got killed in that gulch, or right close there.

I mined some there in the mouth of that gulch, one winter four of use worked there; we shoveled it into sluice-boxes; four of us worked there a month and made $40. I never heard of any profitable mining being done around in this neighborhood, not of late years—I suppose there had been in early days. [54] This ground-sluicing I tell about had been done prior to 1907. I don't think there was any land left there that could be ground-sluiced when I went on there in 1907. There are no known mines in the vicinity of this property at all that I know of. The nearest paying mine from there is about 40 miles; that is the Plymouth Consolidated Mine. I never saw any leads

(Testimony of Ezra Taylor.)

on this property. I saw some white crystalized quartz, but I don't think it contained any mineral.

Q. What is the land in regard to timber?

A. It is very good timber land. There is some sugar pine, some fir, some cedar and yellow pine. I should judge it would go about 15 trees to the acre; 15 trees to the acre is not slim for sawmill timber.

Q. For how long a period prior to 1907 had this been ground-sluiced out there, if you know?

A. I could not say exactly how long. I think 1906 was the last time they worked in there, but I am not positive about that. I don't think there has been any mining done there since 1907.

Q. From your knowledge of sluicing, when you went on that land in 1907, what would you say of it?

A. I would say it was more valuable for timber than it was for mining.

Q. Why would you say that?

A. Because I did not think there was any paying mines there. It was what I would consider a pretty fair piece of timber land.

Q. What were the general conditions there at that time in regard to gravel, in 1907?

A. I don't think there was any gravel there; I never noticed any or saw any. I never saw any gravel there.

Q. You said there was no gravel in this ravine; what was there that they mined there, or ground-sluiced for, that is what I want to get at?

A. Well, that is what I would like to know. This ditch they have spoken about was not on the land, I

(Testimony of Ezra Taylor.)

don't think. In going down on the west side you could not see those cabins there—you could not see them from the east side, either, there was too much timber —you have to get pretty close to them [55] to see them, because there is too much timber. The cabin is in a basin—around there is what we call buck brush, but not very much—the timber consists of cedar, spruce, fir. You can see the cabin perfectly plain when you get pretty close to it. I don't think you can see the cabins from where the mining work had been done.

Cross-examination.

Mr. Robertson asked me to act as a witness in the purchase of this piece of land that is in controversy. I saw him fishing up there, and asked him if he was up there fishing. I run cattle in that country, and I am very inquisitive if I see a stranger up there. I want to know what he is doing. I asked him if he was fishing, and he said he was up there fishing, and also looking for a good piece of timber land. I told him there was some in there. He came back afterwards and asked me if I would show him the corners. He knew where my cattle camp was—I stayed right up in the mountains at that time, looking after my cattle.

Q. Why is it you stated, when you came and gave your proof, that there was no improvement on the place?

A. Because I consider them abandoned improvements. You can go to almost any quarter section

(Testimony of Ezra Taylor.)

up there and you will find some cabin or house. I did not go in it.

Q. You didn't put yourself to the trouble of looking in the Parker house to see whether people were living there? A. No.

Q. Was there a road or pass leading to the house?

A. Yes, sir.

Q. Anyone passing over or through the Parker claim could see the road leading to the house, could they not? A. Yes.

Q. Why did you testify that it was unimproved property?

A. Because, just as I stated, I supposed it was abandoned property.

Q. If you had a monitor and plenty of water, do you think you could have done more successful mining than you did? A. No, sir, I don't.

Q. You would think $40 is all you could have gotten out of that? A. Yes, sir. [56]

Q. Don't you know, as a matter of fact, that Mr. Parker and his wife and son lived there in that cabin for several years?

A. They were there for a while. He was locating all the ground he could possibly get a notice on.

Q. Do you know whether or not he was working on this place? A. I never saw him working it.

Q. How many times were you on the place, then, before you testified as to its character?

A. Oh, I was on it two or three times, or four or five times a year for 25 years. I was riding after cattle. I spoke to Mr. Parker. During all the time

(Testimony of Ezra Taylor.)

I was on there I never saw him mining.

Q. Do you know where Mr. Parker's home was during all these times you are telling us about?

A. I supposed he lived down here somewhere, either in Oakland or San Francisco, or somewhere down here.

Q. What seasons of the year were you over this land?

A. I usually went up there about June and left there in November.

Q. And during that time from June to November, you never saw Mr. Parker working any of this land?

A. No, sir.

Testimony of Robert White, for Defendant.

ROBERT WHITE, a witness called on behalf of the defendant, after being duly sworn, testified as follows:

I was familiar with the land involved in this controversy around about the year 1907 and before that time. At that time my residence was in the same section. I was living in the southeast quarter, where I own a 40-acre lot. I have a homestead there, since 1904 or 1905. I knew of Mr. Parker being on this lot 4 of the land referred to in this suit about that time. I saw Mr. Parker on that land about 12 years ago, in 1906. I would be there crossing ground probably several times during the summer each year.

Q. Was there any mining being done there that you know of, in 1906?

A. I could not say that there was any being done

(Testimony of Robert White.)

in 1906; there might have been very little. [57] Mr. and Mrs. Parker—the old gentleman and the old lady, they were living there in 1906, during the summer time. I don't know that there was anyone in 1907.

Cross-examination.

There was a blind road that passed up the ridge above the house. You could not see the house from this road, but there was a trail from the road to the house.

Testimony of Seymour Hill, for Defendant.

SEYMOUR HILL, a witness called on behalf of the defendant, after being duly sworn, testified as follows:

My business is mining principally. I examined the property in controversy here May 7, 1916, with regard to seeing whether or not it is mining property. I saw a hole, I could not say how deep, but from the dump I suppose perhaps 4 feet deep, or something like that; and another one a little further up the hill, perhaps 7 or 8 feet. I looked for quartz. They were evidently sunk for quartz. There was a little quartz on the dump—well, you might say blisters of quartz. I took some of the best-looking rock I could see from each place and took them home and pounded them up to see, and I didn't get anything out of them at all. A little further over, between the cabins and those holes, there was evidence of some surface mining. I should think at the head of where it had been sluiced out it was 150 feet wide,

(Testimony of Seymour Hill.)

or perhaps a little longer. I went down into those cuts. I also followed them down the creek that goes south from the river until I was satisfied I was off of that ground. I did not see any quartz gravel, or, in fact, any kind of gravel at the upper end where they had been mining; it was just like a big wash-out that there will be in any of those granite mountains; they were soft. In fact, I did not see any evidence of anything that would make either a gravel or a quartz mine.

Q. In your opinion, is that land valuable for mining? A. No, sir. [58]

Q. Why not?

A. Well, in my experience in mining, it generally takes something to make gold—to use my own phrase, and we do not usually find gold in a mountain without there is gravel there for placer. There is no evidence of any ledge there. There are very little stratas of white, blister-looking quartz; they seem to be more of a gush than anything else; they don't seem to go any place. I did not see any evidence of a mine there.

Q. Did you see anything there that would warrant a man in expending any money in developing it?

A. No, nothing whatever.

Q. Tell us about this cut-out or wash-out; did that show any evidences of any gold there?

A. No, I saw nothing there at the head of it—the bigger part of it—I saw no evidence of what would cause any gold to be there.

As evidence of gold I would look for gravel in

(Testimony of Seymour Hill.)

placer. If there had been any gravel there, there evidently would be some of it along where they did work. You would see gravel boulders and rock. There would be some signs of it. I did not see a piece of gravel as big as my fist in the whole thing. Further down the ravine, there was little signs of a little gravel there. My impression would be, from what I had seen of it, that there had been a little ravine, perhaps 8 or 10 feet wide, that at some time or other had gold in it, but that had been washed out, and they followed it up into the mountain, where there was absolutely nothing. Those ravines occur in the country around about there. We have a very wide belt of it in Eldorado county. This is in the extreme east; in fact, it is beyond anything that ever amounted to very much.

The land showed no evidences of mining having been done on it recently. [59]

Cross-examination.

I am not a mineralogist. My experience is life-long mining. You could not get into the shaft, it was all caved in. It is a fact that you can find quartz lying around very valuable mines and you would not find any gold of any consequence in them at all. That is true of a larger ledge, where there is more quartz; there is so little quartz here that you could not make a mistake as to what came out of the hill.

I think it is in the south end of the shaft, there is one side of it, anyhow, that has just a little, small —I would not call it a ledge at all in a country where

(Testimony of Seymour Hill.)

there are ledges; it is a very small, little bit of quartz, it does not show on the other side. I took pieces from the largest quartz you could see that came out of that hill. Evidently, none were ever taken away. Those shafts were partly filled. There had been mining done there in the past.

Testimony of Norris English, for Defendant.

NORRIS ENGLISH, a witness called on behalf of the defendant, after being duly sworn testified as follows:

I am a mining engineer, residing in San Francisco. I graduated from the University of California 19 years ago, and have followed my vocation exclusively right along. When I first graduated, I acted as assistant to H. F. Harvey, mining engineer at Galt; a little bit later I was foreman of the Grant gold mine in Tuolumne county. Early in 1908 I was made assistant superintendent of the Lightener Mine, at Angels Camp. In 1909 I worked in a mill at Plymouth, a mill that was working the old waste dumps of the Plymouth Consolidated Mines.

I examined the property in question here on May 5th and 6th, 1916, with a view to testifying about it here.

There were two cabins on the ground—the cabins are in [60] bad repairs. They are somewhere from 10 to 20 years old, I should judge.

As to workings, in the northwest portion of Lot 4 I found a pit about 10 feet in diameter and 5 feet deep at the present time; it has been excavated; it

(Testimony of Norris English.)

was a solidified granite. It was partially filled up. I took a sample of the material that had been excavated from the shaft and brought it down here with me and had it assayed. About 150 feet from that shaft is another shaft. At the present time it is open to a depth of 12 feet. On one side of the shaft there is a stringer of quartz that I measured. The shaft is in a dangerous condition, and I did not go down into it. There was a cut alongside the shaft, and I came down into that and reached over and measured the quartz. It was 11 inches wide. That quartz continued on down as far as I could see in the shaft to where it was filled, but it did not show on the opposite side of the shaft. I took a sample from the quartz in place, from as low down as I could reach, and had it assayed, and it showed no values in gold or silver.

The first sample either assayed a trace in gold or silver, or one one-hundredth of an ounce, 20 cents per ton; it was negligible.

Further south from this second shaft, and down a ditch which runs in a northerly and southerly direction across lot 4, and I think in pacing the distance it was slightly over the southern boundary of Lot 4, there is a ground-sluice, where water has been turned out of the ditch and has sluiced out a cut that is about 15 feet wide and 15 feet deep, and 50 or 60 feet long. Further down the slope, the ditch runs on below that, about 2 by 3 feet in the section; in the bottom of the [61] ground-sluice is the remains of an old windlass that was sunk down

(Testimony of Norris English.)

on a slip in the granite.

This excavation does not show any gravel; it was merely an excavation in soil and decomposed bed-rock. The dump from the shaft that was sunk below the windlass consisted of decomposed granite sand.

About 150 feet east of the second shaft that I refer to, and about 500 feet from this ground-sluice, there was another ground-sluice in a small ditch taking water from the main ditch, and runs down hill in a small section, about 2 by 2 feet, for 100 feet, and then was enlarged until the section was probably 20 by 20 feet for a distance of 150 or 160 feet. This excavation shows no gravel, whatever, very little quartz, and is entirely in soil and decomposed bed-rock, consisting of granite and diorite. This cut continued on down and flows into the main cut where the principal mining was done on the property, but is smaller in section, about 5 by 5 feet. That is not quartz work at all, it is all placer work, except those first two shafts.

The principal work on the property has been done about 200 feet south of the most westerly cabin; it consists of a ground-sluice, or a sluice that has been carried up from the ravines, 1000 feet or more down below the cabin up to within 40 or 50 feet of the ditch. The upper part of the cut has been worked out by the use of a small giant, which took water out of the ditch, and which was connected by a string of eight-inch pipe, because there is some of that size pipe on the ground. This excavation in no place shows any gravel. I examined particularly the

(Testimony of Norris English.)

coarse rocks that had been piled out and thrown out of this trench, so as to give the water a chance to cut, and [62] found no washed gravel. The entire cut is in soil, and the soil is principally a decomposed lava, it makes a deep, red soil, and below that in decomposed granite.

That is all the workings I saw on the property. On Section 31, adjoining this property, and a quarter of a mile beyond the point where the ditch comes into this property, there has been a tunnel run and some quartz lying around the dumps.

The quartz only occurs in spots here and there. There is no distant ledge, and there is no continuous outcrop, and no indications that the ledge would become continuous in depth.

There was no gravel on the property. They were ground-sluicing the soil and decomposed bedrock.

Q. From what you saw, would there be anything there to warrant a man spending his time to develop the property?

A. There is absolutely no indication that would warrant a prudent man in making any expenditure there to develop a mining property.

Q. Could a man make anything from working this land in the way of profit in mining?

A. No.

I panned the sides of the principal cut in five different places, in order to find out if the decomposed bedrock and soil carried any values, and I did not get any colors in any one of the five pans. I think

(Testimony of Norris English.)

anything that may have been there in the early days has been exhausted.

Around this principal ground-sluice as to which I have testified, there are second growth pines that I suppose are anywhere from five to ten years old; they are an inch and an inch and a half in diameter. Further on down, in a place where the water from a spring runs, there are alders, above 4 inches in [63] diameter, that have grown there since mining stopped. I don't think any mining has been done there inside of 10 years, except a little prospecting around with a pan. I think the shafts were sunk with the idea that the quartz would become larger and richer with depth, but there are no indications of any values of quartz on the surface, or any size that would make a mine.

Cross-examination.

I think one man, or two men, could have done all the work there in five years.

Q. Now, you don't mean to say from your examination, that a man and his wife could not have lived from the proceeds of the mineral they got out of that ground, do you? A. Absolutely, yes.

I said I was there two days—I put in 12½ hours. And from my examination I could go back and read back for eight or ten years, and say that no mineral of any consequence had been brought out of that ground. It is not a fact that our best mineralogists and our best mining engineers are often deceived on these things, though they are at times.

Q. If you had surveyed that tract of land, and had

(Testimony of Norris English.)

cruised the timber, would you have noticed these excavations and all this work that you narrated?

A. If I had run the range line between townships 13 east and 14 east, I would not have seen this work.

Q. I am speaking of surveying the land.

The COURT.—Answer the question. He says if you surveyed the land and cruised the timber, would you have seen the evidence of this work and this excavation.

A. I don't think that is a proper question.

Q. Will you answer it? It is not for you to rule upon whether it is a proper question, or not. I have admitted it. Read the question, Mr. Reporter. [64]

(Question read by the reporter.)

A. May I ask you, Judge, whether you mean by surveying the land, the same kind of a survey the Government makes when it subdivides the land?

Q. Can you answer the question? If not, just say that you cannot. It is a perfectly proper question.

A. No.

Q. (Mr. JARED.) Was there any timber near the place? A. Near what place?

Q. Near the place you have spoken of, these shafts and the ditch and the houses.

A. Yes, there is timber everywhere.

Q. Then, if you had cruised that timber there, would you not have seen the cabins?

A. No.

Q. What would you have done to keep from seeing them?

(Testimony of Norris English.)

A. In cruising timber, it is only necessary to cruise a narrow strip.

The COURT.—Do you know anything about cruising timber?

A. Only from what I have been told.

Q. (Mr. JARED.) How far was the line from this cabin?

A. About 1,000 feet, that is, the range line.

Q. (The COURT.) Where would you have to go, according to your idea, Mr. English, to get a chance to see these buildings and this work that you have been so elaborately describing here?

A. You would have to go across the north end of the property.

Q. You would not have to go among the timber at all? There is no timber there, I suppose.

A. Yes, there is timber everywhere, Judge.

Q. Then why do you say if you had cruised the timber on that place you would not see these improvements you have been describing?

A. Because I would have taken the north and the south line. [65]

Q. I am not talking about what you would have done, at all, I am talking about what was done. You have not got any partisan feeling here, have you, as a witness?

A. No, only if I don't think you are asking fair questions I am partisan, yes.

Q. It is not for you to pass upon the questions. Counsel asks them, and if the other side objects the Court passes upon them, the witness does not.

(Testimony of Norris English.)

A. No, but I would like to have the question specify what it means.

Q. When you are in court you will have to answer the questions as they are put to you.

Q. (Mr. JARED.) Why, don't you understand what surveying a section or a quarter section is, and what cruising timber is?

A. Because I know nothing about cruising, except what I have been told.

Q. You know what surveying a quarter section is?

A. Yes, it is setting a certain number of corners; I know how it is done, because I have done it.

Q. Do you know how far the north line is from the cabin and from the excavations?

A. Yes, I know approximately; the north line is some 200 or 300 feet from the cabins.

Q. And then you would say that you could survey this property, and would not know that the cabin was located there?

A. I may not have run that part of the line at all, because the Government, in surveying on those sections, does not run all the lines.

Q. How do you know that the Government does not run those lines?

A. Because I have worked on the Government survey.

Q. What kind of lines do they run?

A. They run either a north and south line or an east and west line, whichever happens to be [66] most convenient to run out and set a corner.

Q. How far was the corner from the cabin?

(Testimony of J. E. Remick.)

A. The cabin was at least 1,000 feet from the corner.

Testimony of J. E. Remick, for Defendant (Recalled).

J. E. REMICK, recalled as a witness for the defendant, after being duly sworn, testified as follows:

In 1907, in October and November, I was familiar with the value of timber of this character. This timber was worth about $10 per acre.

Cross-examination.

Q. I believe you said it would cruise about 25,000 feet per acre, did you not? A. I did.

Land cruising 25,000 feet per acre was not worth over $10 in 1907—you must understand that land is worth just what you can get for it. [67]

Stipulation Re Statement of Evidence.

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties hereto that the foregoing statement of the evidence to be included in the record on appeal is full, true, complete and properly prepared, and that said appeal may be heard thereon, and that it shall become a part of the record of said cause for the purpose of an appeal herein.

ED. F. JARED,
Asst. U. S. Atty,
Attorney for Plaintiff.

JORDAN & BRANN,
Attorneys for Defendant W. P. Frick.

Dated: 30 July, 1918.

Approval of the Statement of the Evidence to be Included in the Record on Appeal.

The foregoing statement of the evidence to be included in the record on appeal being now presented and found to be true, complete and properly prepared:

I do hereby approve the same and direct that it be filed in the office of the Clerk of the United States District Court for the District of California, and that it shall become a part of the record for the purposes of an appeal herein.

Dated at San Francisco, California, the 30th day of July, 1918.

WM. C. VAN FLEET,
United States District Judge, Northern District of California, Second Division.

[Endorsed]: Filed Jul. 31, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [68]

In the District Court of the United States for the Northern District of California, Second Division.

No. 15,388—IN EQUITY.

UNITED STATES OF AMERICA,
Complainant,

vs.

W. P. FRICK, JOHN DOE, RICHARD ROE and ALBERT DOE,
Defendants.

Petition for Order Allowing Appeal.

To the Honorable Court, Above Entitled:

The above-named defendant, W. P. Frick, conceiving himself aggrieved by the decree filed and entered on the 7th day of August, 1917, in the above-entitled cause, does hereby appeal therefrom to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit for the reasons and upon the grounds specified in the assignment of errors, which is filed herewith, and prays that this appeal may be allowed, that a citation issue as provided by law, and that a transcript of the record, proceedings, exhibits and papers, upon which said decree was made and entered as aforesaid, duly authenticated, may be sent to the Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco.

And your petitioner further prays that an order be made fixing the amount of security which the defendant, Walter P. Frick, shall give and furnish upon such appeal, and that upon giving such security all further proceedings in this court be suspended and stayed until the determination of said appeal by said United States Circuit Court of Appeals for the Ninth Circuit.

JORDAN & BRANN,
Attorneys for Defendant W. P. Frick.

[Endorsed]: Filed Nov. 14, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [69]

In the United States Circuit Court of Appeals in the Ninth Circuit, in the Northern District of California.

W. P. FRICK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Assignment of Errors.

W. P. Frick, one of the defendants in the cause in the court below, entitled: "United States of America, Plaintiff, vs. W. P. Frick, John Doe, Richard Roe and Albert Doe, Defendants." In Equity—No. 15,388 in the District Court of the United States for the Northern District of California, Second Division, and appellant herein, by Jordan & Brann, his solicitors and counsel, says, that in the record and proceedings in the said cause in the said court below there is manifest error, and he particularly specifies the following as the errors upon which he will rely and which he will urge upon his appeal in the above-entitled cause:

1. That the District Court of the United States for the Northern District of California erred in holding that the evidence in said action sustained the charge of fraud made in the bill against the defendant W. P. Frick.

2. That the District Court of the United States for the Northern District of California erred in holding that the evidence was sufficient to entitle the

plaintiff to recover from the defendant the amount of money he realized from the sale of the land after he had sought it from the patentee.

3. That the District Court of the United States for the Northern District of California erred in finding in favor of the plaintiff and against the defendant W. P. Frick on the ground that the evidence was insufficient to support the findings of the Court.

4. That the District Court of the United States for the Northern [70] District of California erred in sustaining the bill of complaint and entering the decree herein.

5. That the District Court of the United States for the Northern District of California erred in not dismissing the complaint as prayed for by the defendant.

In order that the foregoing assignments of errors may be and appear of record, the appellant presents the same to the Court, and prays that such disposition be made thereof as is in accordance with the law and the statutes of the United States in such cases made and provided, and that said decree be reversed and the bill of complaint herein dismissed.

All of which is respectfully submitted.

JORDAN & BRANN,
Attorneys for Defendant W. P. Frick.

[Endorsed]: Filed Nov. 14, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [71]

In the District Court of the United States for the Northern District of California, Second Division.

No. 15,388—IN EQUITY.

UNITED STATES OF AMERICA,

Complainant,

vs.

W. P. FRICK, JOHN DOE, RICHARD ROE, and ALBERT DOE,

Defendants.

Order Allowing Appeal.

The foregoing petition for appeal is hereby granted and the appeal is allowed and upon the petitioner filing a bond in the sum of seven thousand five hundred dollars with sufficient sureties, to be conditioned as required by law, shall operate to suspend and stay all further proceedings in this court until the determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Nov. 22, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [72]

In the District Court of the United States for the Northern District of California, Second Division.

IN EQUITY—No. 15,388.

UNITED STATES OF AMERICA,

Complainant,

vs.

W. P. FRICK, JOHN DOE, RICHARD ROE, and ALBERT DOE,

Defendants.

Order Allowing Withdrawal of Original Exhibits.

On motion of Messrs. Jordan & Brann, attorneys for W. P. Frick, defendant, and good cause appearing therefor, it is by the Court now ordered:

That all the exhibits in the above-entitled case, both plaintiff's exhibits and defendant's exhibits, be, and hereby are, allowed to be withdrawn from the files of the court in this case, said original exhibits to be returned to the files of this court upon the determination of said appeal by said Circuit Court of Appeals.

WM. C. VAN FLEET,

Judge.

Dated November 22d, 1917.

[Endorsed]: Filed Nov. 22, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [73]

In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,388.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

W. P. FRICK, JOHN DOE, RICHARD ROE and ALBERT DOE,

Defendants.

Cost Bond on Appeal and Staying Execution.

KNOW ALL MEN BY THESE PRESENTS: That the Globe Indemnity Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and duly authorized to transact a general surety business in the State of California, as surety, is held and firmly bound unto the United States of America for the full and just sum of seventy-five hundred and 00/100 ($7,500.00) dollars, to be paid to the said United States of America, to which payment, well and truly to be made, we bind ourselves, our successors, representatives and assigns, jointly and severally, by these presents.

Sealed with our seal and dated this 12th day of December, 1917.

WHEREAS, W. P. Frick et al. have appealed to the United States Circuit Court of Appeals for the Ninth District, from the decree of the District Court of the United States and for the Northern District of California, bearing date of the 7th day of Au-

gust, 1917, and made and entered in said cause on said date against said defendants W. P. Frick et al. and in favor of said plaintiff, United States of America, for the principal sum of sixty-four hundred seventy-five and 95/100 ($6,475.95) dollars, together with costs amounting to one hundred thirty and 16/100 ($130.16) dollars, and interest from the date of the decree upon said sum at [74] the rate of seven (7) per cent per annum until recovery is paid; and,

WHEREAS, said defendants, W. P. Frick et al., desires, during the process of such appeal, to stay the execution of the said decree of the above-entitled District Court:

NOW, THEREFORE, the condition of this obligation is such that if said W. P. Frick et al. shall prosecute said appeal with effect and pay all costs which may be awarded against them as appellant if the appeal be not sustained, and shall abide by and perform whatever decree may be entered against it in this cause by the United States Circuit Court of Appeals for the Ninth Circuit, or, on the mandate of said court, by the said District Court below, then this obligation to be void; otherwise, the same shall be and remain in full force and effect.

W. P. FRICK.

GLOBE INDEMNITY COMPANY.

(Corporate Seal) By S. F. NORWOOD,
Attorney in Fact.

Approved:

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Dec. 20, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [75]

In the District Court of the United States for the Northern District of California, Second Division.

IN EQUITY—No. 15,388.

UNITED STATES OF AMERICA,
Complainant,

vs.

W. P. FRICK, JOHN DOE, RICHARD ROE and ALBERT DOE,
Defendants.

Praecipe for Transcript on Appeal.

To the Clerk of U. S. District Court:

Please incorporate the following papers, documents and exhibits in the transcript of record on appeal in the above-entitled cause:

1. Bill of complaint.
2. Defendant W. P. Frick's answer.
3. Final decree of August 7, 1917.
4. Petition for order allowing appeal.
5. Assignment of errors.
6. Order allowing appeal.
7. Order allowing withdrawal of exhibits.
8. Memorandum of bond on appeal.
9. Citation.
10. Copy of praecipe.
11. Statement of evidence on appeal.
12. Opinion of Court.

13. Original exhibits (to be produced and transferred, but not printed).

JORDAN & BRANN,
Attorneys for Defendant W. P. Frick, Appellant.

[Endorsed]: Filed Jul. 31, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [76]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,388.

UNITED STATES OF AMERICA,
Complainant,

vs.

W. P. FRICK et al.,
Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing seventy-six (76) pages, numbered from 1 to 76, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for transcript of record, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing

transcript of record is $33.45; that said amount was paid by the attorneys for the defendants; and that the original citation issued herein is hereunto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 22d day of August, A. D. 1918.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [77]

Citation on Appeal.

UNITED STATES OF AMERICA,—ss.
The President of the United States, to the United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, Second Division, wherein W. P. Frick is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the North-

ern District of California, this 20th day of December, A. D. 1917.

WM. C. VAN FLEET,
United States District Judge. [78]

Receipt of a copy of the within is hereby acknowledged this 28th day of December, 1917.

JNO. W. PRESTON,
United States Attorney,
ED. F. JARED, Asst.,
For Plaintiff.

[Endorsed]: No. 15,388. United States District Court for the Northern District of California, Second Division. United States of America vs. W. P. Frick et al., Appellant. Citation on Appeal. Filed Dec. 28, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3206. United States Circuit Court of Appeals for the Ninth Circuit. W. P. Frick, Appellant, vs. The United States of America, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed August 29, 1918.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

W. P. FRICK,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Order Enlarging Time to and Including February 18, 1918, to File Record and Docket Cause.

Good cause being shown, it is hereby ordered that the appellant in the above-entitled case may have to and including the 18th day of February, 1918, within which to file the record on appeal and docket the case in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated January 18, 1918.

WM. C. VAN FLEET,
U. S. District Judge. [79]

[Endorsed]: No. 3206. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to and Including February 18, 1918, to File Record Thereof and to Docket Case. Filed Jan. 18, 1918. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

W. P. FRICK,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Order Enlarging Time to and Including March 18, 1918, to File Record and Docket Cause.

Good cause being shown, it is hereby ordered that the appellant in the above-entitled suit may have to and including the 18th day of March, 1918, within which to file the record on appeal and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated February 18, 1918.

WM. C. VAN FLEET,
U. S. District Judge. [80]

[Endorsed]: No. 3206. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to March 18, 1918, to File Record Thereof and to Docket Case. Filed Feb. 18, 1918. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

W. P. FRICK,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Order Enlarging Time to and Including April 18, 1918, to File Record and Docket Cause.

Good cause being shown, it is hereby ordered that the appellant in the above-entitled suit may have to and including the 18th day of April, 1918, within which to file the record on appeal and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated March 18, 1918.

WM. C. VAN FLEET,
United States District Judge. [81]

[Endorsed]: No. 3206. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to April 18, 1918, to File Record Thereof and to Docket Case. Filed Mar. 18, 1918. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

W. P. FRICK,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Order Enlarging Time to and Including May 18, 1918, to File Record and Docket Cause.

Good cause being shown, it is hereby ordered that the appellant in the above-entitled case may have to and including the 18th day of May, 1918, within which to file the record on appeal and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated April 18, 1918.

WM. C. VAN FLEET,
Judge. [82]

[Endorsed]: No. 3206. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to May 18, 1918, to File Record Thereof and to Docket Case. Filed Apr. 18, 1918. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

W. P. FRICK et al.,
Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee.

Order Enlarging Time to and Including June 17, 1918, to File Record and Docket Cause.

Good cause being shown, it is hereby ordered that the appellants in the above-entitled case may have to and including the 17th day of June, 1918, within which to file the record on appeal and docket the

cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated May 17, 1918.

WM. W. MORROW,

Judge of the U. S. Circuit Court of Appeals for the Ninth Judicial Circuit. [83]

[Endorsed]: No. 3206. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to June 17, 1918, to File Record Thereof and to Docket Case. Filed May 17, 1918. F. D. Monckton, Clerk.

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 15,385.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

W. P. FRICK et al.,

Defendants.

Order Enlarging Time to and Including July 16, 1918, to File Record and Docket Cause.

Upon application of Mr. Edward F. Jared, Assistant United States Attorney for the Northern District of California, counsel for the plaintiff, and good cause therefor appearing, it is

ORDERED that the time to file transcripts of record and docket the above-entitled causes in the United States Circuit Court of Appeals be, and hereby is extended from the 16th day of June, 1918,

to and including the 16th day of July, 1918.

Dated San Francisco, Cal., June 16, 1918.

WM. C. VAN FLEET,
United States District Judge. [84]

[Endorsed]: No. 3206. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to and Including July 16, 1918, to File Record Thereof and to Docket Case. Filed Jun. 15, 1918. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Judicial Circuit.

W. P. FRICK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Order Extending Time to and Including August 16, 1918, to File Record on Appeal.

Good cause being shown, it is hereby ordered that the appellant in the above-entitled case may have to and including August 16, 1918, within which to file the record on appeal and docket the cause in the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated July 16, 1918.

WM. H. HUNT,
Judge.

[Endorsed]: No. 3206. United States Circuit Court of Appeals for the Ninth Circuit. Order

Under Rule 16 Enlarging Time to August 16, 1918, to File Record Thereof and to Docket Case. Filed Jul. 15, 1918. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Judicial Circuit.

W. P. FRICK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Order Extending Time to and Including September 14, 1918, to File Record on Appeal.

Good cause being shown, it is hereby ordered that the appellant in the above-entitled cause may have to and including September 14, 1918, within which to file the record on appeal and docket the cause in the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated August 15, 1918.

WM. C. VAN FLEET,

Judge.

[Endorsed]: No. 3206. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to September 14, 1918, to File Record Thereof and to Docket Case. Filed Aug. 15, 1918. F. D. Monckton, Clerk.

No. 3206. United States Circuit Court of Appeals for the Ninth Circuit. Eight Orders Under Rule 16 Enlarging Time to September 14, 1918, to File Record Thereof and to Docket Case. Re-filed Aug. 29, 1918. F. D. Monckton, Clerk.

No. 3206

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. P. FRICK,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

JORDAN & BRANN,
Attorneys for Appellant.

PUNAU-WAU H PRINTING CO.

No. 3206

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. P. FRICK,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

Action in Equity. This suit was commenced upon the 27th of October, 1911, for the purpose of obtaining a decree cancelling a patent for timber land issued to one Bolling C. Robertson,—now deceased,—upon the 6th day of April, 1908, whereby the Government conveyed to Robertson Lots 3, 4, 5 and the SE ¼ of the NW ¼ of Section 6, Township 8 North, Range 14 East, M. D. B. & M. all lying in Eldorado County, California. The relief sought by the plaintiff is based upon the charge that the patent was obtained by fraud, in that both the application to purchase the land and the affidavit of its non-mineral character contained false statements as to the non-mineral character of the land and as to its being unoccupied.

Upon the trial in the lower court, it appeared that the land had been sold by the locator first to the defendant Frick,—who was charged as a co-conspirator with the locator in the obtainment of the patent,—and by him subsequently to the California Door Company, who is admitted to have been an innocent purchaser for value. For the latter reason the court declined to cancel the patent, but granted as a relief a judgment against appellant Frick in the sum of $6475.95, being $32.50 per acre, the full amount received by Frick for the land upon its sale to the Door Company May 25, 1911.

Facts of the Case.

From the record before the court the undisputed facts appear to be as follows:

Upon the 23rd day of August, 1907, Robertson filed in the United States Land Office at Sacramento an application to purchase the land in question under the provisions of the Act of Congress, approved June 3, 1878, and the acts amendatory thereto entitled: "An act for the sale of Timber Lands in the States of California, Oregon and Nevada, and in Washington Territory". The application was duly received, accepted and filed by the officials of the Land Office, and, upon the 28th day of October, 1907, Robertson made his final proof before the officials, and on the same date he made his payment for the land and received the recorder's receipt therefor. April 6, 1908, a patent was issues by the

Government to Robertson under the provisions of the Act referred to, who a few days later sold it to defendant Frick for $5 per acre the deed being recorded upon the 22nd day of September, 1909, and Frick in turn upon the 25th day of May, 1911. conveyed it to the California Door Company at $32.50 per acre.

In the application for the patent, Robertson, after describing the land by its legal subdivisions, stated that it was unfit for cultivation and was valuable chiefly for its timber; that it was uninhabited and contained no mining or other improvements, and that he verily believed that it did not contain any valuable deposits of gold, silver, cinnabar, copper or coal, and that he had made no other applications under the Act; that he did not apply to purchase the land on speculation, but in good faith, with the object of appropriating it to his exclusive use and benefit; and that he had not directly, or indirectly, made any agreement or contract in any way or manner, with any person or persons whomsoever, by which the title which he might acquire from the Government of the United States would inure in whole or in part to the benefit of any person except himself.

With the application he filed also, as required by law, a non-mineral affidavit in which he declared, among other things, that he was well acquainted with the character of the land and each and every legal subdivision thereof, and that he had frequently passed over it; that to his personal knowledge there was not, within the limits thereof, any

vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead or copper, or any deposit of coal; that no portion of the land was claimed for mining purposes under the local customs or rules of miners or otherwise, and that no portion of it was worked for mineral during any part of the year by any person or persons; that the land was essentially non-mineral and that his application therefor was not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing it for timber purposes.

The foregoing papers, together with all the proceedings had in the Register's office, are admitted to have been regular in form, and in compliance with the Federal statute.

Upon the filing of his application for the purchase of the land, the Register posted in a conspicuous place in his office, upon the 24th day of August, 1907, notice of the application, and that there was no adverse claim to the land therein described known to his office. A notice of the application for the purchase was also duly published once a week for nine consecutive weeks in the Eldorado Republic, a newspaper published nearest the land. A copy of the affidavit of this publication, duly sworn to, was filed in the Land Office upon the 24th of October, 1907.

The time fixed for Robertson to prove up upon the land was set for the 28th day of October, 1907, and the place named was the office of the Register of the United States Land Office at Sacramento.

The time and place was likewise stated, in the published and posted notices. Upon the arrival of the time, Robertson appeared with two witnesses: Frick and Taylor, and made the necessary proof, their testimony being taken by questions and answers in the regular form. Robertson then testified, among other things, that he was personally acquainted with the described land, and each of its smallest legal subdivision; that he had been upon it a number of times, and had made a thorough inspection, the last time being October 5, 1907; that he walked over the land taking its four corners; that it was unoccupied and unimproved, and that it was not and would not be fit for cultivation, even if the timber were removed; that it was very rough, rugged and rocky, situated in a high altitude, with poor thin soil; that it was thickly covered with timber and underbrush, and that the soil rendered it unfit for cultivation; that there were no salines or indications of deposits of gold, silver, cinnabar, copper or coal upon it, and that it was chiefly valuable for its timber; that it contained sufficient quantities of timber, such as fir, spruce and pine to render it valuable for that purpose, but that it had no value for any other purpose; that he estimated the market value of the timber standing upon it at $1500, and that he had not directly, or indirectly, made any agreement, or contract, in any way or manner with any person, by which the title which he might acquire from the Government would inure in whole or in part to the benefit of any person except himself, and that he

made the application in good faith; that when he went over the land upon the 5th of October, he was in company with a Mr. Taylor, that he found the Government corners, and that he estimated that there were about three million feet of timber upon it having a stumpage value of fifty cents per thousand; that he arrived at his estimate as to the stumpage by consulting with people in the vicinity who were practical lumber men and woodsmen; that he expected to hold the land as an investment.

Defendant Frick, one of his witnesses, testified that he was acquainted with the land described in each of its smallest legal subdivisions, that he had been over it many times, having surveyed it, and was also there on the 18th of October, 1907; that it was then unoccupied and unimproved and unfit for cultivation; that it was precipitous and rocky, but that it had a good growth of timber on it; that there were no salines, or indications of deposits of gold, silver, cinnabar, copper or coal upon the land, and that it was chiefly valuable for its timber, which consisted of fir, spruce and pine; that it had no value for any other purpose whatsoever and that he was not in any way interested in the application, or in the land described, or in the timber, or other contents of the property; that in surveying he had learned the lines upon the property and that he had known Robertson a couple of years.

It was upon the foregoing testimony, and like evidence from the other witness, Ezra Taylor, that the patent in question was issued.

THE GOVERNMENT FAILED TO MAKE OUT ITS CASE.

A patent issued by the United States Government to land is a solemn instrument, and it is elementary that all such patents are clothed and wrapped about with a presumption of verity. The action being in equity to set the patent aside, the burden of overcoming this presumption clearly rested upon the Government, and the proof to warrant the court in setting aside the patent must be clear, unequivocal and convincing. The decision to vacate cannot be supported by a mere preponderance of evidence. As was stated by Mr. Justice Miller in the case of U. S. v. Budd, U. S. Supreme Court Reports, 30 L. Ed., p. 384, "we take the general rule to be that when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud, or mistake in the execution of the instrument itself, the testimony upon which this is done must be clear, unequivocal and convincing, and that it cannot be done by a purely preponderance of evidence which leaves the issue in doubt". With this lamp as our guide, let us see if the evidence in this case, as shown by the record, was so "clear, unequivocal and convincing" in its character as to leave no

doubt in any unprejudiced mind as to the guilt of the locator and his witnesses.

The basic allegations upon which the Government rested its case and the controlling issues which it confidently tendered were two in number:

> 1. That at the time of entry, August, 1907, the land was valuable and known to be valuable mineral land—more so than for timber.
> 2. That the entryman, Robertson, with the connivance of his proof witness, Frick, and both with full knowledge of its minteral character and value, fraudulently sought to acquire the mineral land through a timber and stone entry. It was further alleged by the Government that the purchase of the land for its timber value was a subterfuge, and that as a matter of fact it was at the time of the location more valuable for mining than for timber, and that in truth and fact the entryman really sought to obtain the mines on the land and to work it for that purpose.

That the Government failed utterly to prove either of these fundamental allegations must be apparent.

In the case of U. S. v. Central Pac. R. R. Co., et al., 93 Fed. 871, the court made use of the following language:

> "the burden rests on the complainant to overcome the presumption in favor of the patent by satisfactory evidence, not only that the land was known mineral land *at the time the patent was issued,* but that it is chiefly valuable for mineral purposes. Evidence that gold placer mining had formerly been carried on in a stream on the tract, but that it had been abandoned as worked out prior to the date of

> the patent, and that neither at that time nor since had there been any mines on the land producing mineral and capable of being worked at a profit, is insufficient, as is also evidence of the mineral character of adjoining land."

As to the first proposition, that the land is mineral land and valuable for its minerals, the evidence adduced by the Government fails. Mr. Kingsbury, the Government expert, who as a matter of fact never had any practical experience as a placer miner in California, did some panning, or was present when a Mr. Murray did it, and they found *a number of colors of gold in the pan.* How many colors were found and in how many pans, what value these pannings seemed to give, and how much gravel of that auriferous character was found on the land, *do not appear in his testimony.* Mr. Kingsbury says that he found two shafts, one 10 feet and the other 12 feet in depth, showing some quartz veins, but he made no measurements of them, took no samples, made no assays, found no gold or indication of gold, *nor did he trace out any ledge in place.*

It must be remembered that Mr. Kingsbury is the mineral inspector for the Land Department; he is employed, and at the time he testified had for seven years been employed, as the Land Department expert in such cases as this. It was his duty to find the evidence with which to make the Government's case, and it must be presumed that he searched the land and the neighborhood for every

findable fact to prove the alleged mineral character of the land.

In the case of Alford v. Barnum, 45 Cal. 482, the court says:

> "The mere fact that portions of the land contain particles of gold or veins of gold bearing quartz rock would not necessarily impress it with the character of mineral land within the meaning of the Act referred to. It must at least be shown that the land contains metal in quantities sufficient to render it available for mining purposes. Any narrower construction would operate to reserve from the use of agriculture large tracts of land which are practically useless for any other purpose and we cannot think this was the intention of Congress."

In the case of Steel v. Tanana Mines R. Co., 146 Fed., p. 678, it is said:

> "Doubtless colors of gold may be found by panning in a dry bed of any creek in Alaska, and miners upon such encouragement may be willing to further explore in the hope of finding gold in paying quantities; but such prospects are not sufficient to show that the land is so valuable for mineral as to take it out of the category of agricultural lands and to establish its character as mineral land when it comes to a contest between a mineral claimant and another claiming the land under other laws of the United States."

The Department of the Interior in the case of Reininghaus, 1 L. D. 265, said:

> "The mere fact that portions of the land contain particles of gold would not necessarily impress it with the character of mineral land. It must, at least, appear that it contains metals

> in such quantities as to make it available and valuable for mining purposes."

Many other cases might be cited to support the proposition laid down in the foregoing citations, but we surmise that there is no necessity of going further. Mr. Kingsbury's testimony fails to show anything of value to the Government, in that it appears that the first and only examination that he made of the land was in October, 1910, *three years after the location was made,* and hence knew nothing about any discoveries of mineral upon it at the time either of the location, or the issuance of the patent. Furthermore, he gave no evidence as to the value of the land for mineral purposes found at the time of his examination; he simply says that he found "some quartz veins" which he says were small, and that the panning resulted merely in the obtaining of colors; that in his opinion the gold that he found was a "sufficient indication for a man to go ahead and develop the land with the expectation of making it pay"; that he did not recall at the time of giving his testimony whether he examined the quartz or not; that he saw in the distance,—about half a mile to the South,—that there had been considerable placer work done, and that he did not make any examination of the gravel. He admitted upon cross-examination that there was "some good timber on there—it was a timbered country."

With reference to improvements, he testified that at the time that he was there he saw a cabin, which

was several years old, and that the mining work which he saw had been done three or four years before, but *he thought* that at least *some* of the work was done before the 28th of October, 1907, and that the cabin was there before that time.

We submit that Mr. Kingsbury's testimony fails to show that either at the time of the location, or at the time of the issuance of the patent the land was more valuable for its mineral than it was for its timber. It also fails to show to any satisfactory degree that the improvements which he saw were there as a matter of fact upon the 28th of October, 1907. Surely, the Government must have more satisfactory evidence in support of the plaintiff's case than that of Mr. Kingsbury.

The next witness presented by the Government was a Mr. Mauk, who testified that the *last time he was on the land was in 1902,* that at that time Mr. Parker was running a tunnel, and he brought out a pan or two and panned it in his presence; "there was some gold in the pan, but I cannot recollect, because I was not interested. I didn't pay particular attention, but enough to know that *he had some gold in the pan*". He says that he himself never examined the gravel around this mine; that upon certain occasions prior to 1902 he and Frick were then mining together, and that they loaned Parker a monitor and some pipe and that Frick was present when they loaded it into the wagon and it was hauled away.

With reference to the tunnel Mauk says, that when he was there Parker was running a tunnel into the hill, and "that in the canyon below, where it breaks off, near where he started the tunnel there had been mining work done". It was mined there *"before Parker got the property";* that ground sluicing had been done *lower down in the canyon* before that. He says that the ditch referred to *was built years before Parker purchased the mine,* that it was an old ditch, or a portion of it was, and that he had crossed over it many a time.

Not one word of testimony was obtained from Mr. Mauk as to the property *in the year 1907,* when Robertson proved up on his claim. We must look further then than the testimony of Mr. Mauk for that "clear, convincing and unequivocal evidence" which will warrant a court to vacate or set aside a patent.

Mr. Antone Meyer, another witness produced by the Government, testified that in 1898 he had located up in the mountains and sold timber, and since then has been in the hotel business; that he knew the Parker mine; that Mr. Parker was living there and made his living from the mine while he was there; that there were two little cabins on the ground, *but he could not tell in what year that was;* that when he was there the last time Mr. Lee Parker came in with some rock which he looked at, and that he then went down to the ground and looked at it; that he could not tell exactly how long Parker was

there; that he did some mining adjoining Parker's claim, and that the vicinity in which the Parker claim was located was known as mineral lands; that he went there to see Parker and that Parker was prospecting; that there was *a big cut below* and that they had pipe laying there. In conclusion this witness says: *"It is a good many years since I was over there, but I could not tell how many years it was."*

Not a word fell from the lips of this witness as to any minerals in the lands in question in 1907.

Another witness by the name of Mergurre was called by the Government, merely to show that the California Door Company purchased the land from Frick upon the 25th day of May, 1911, at $32.50 per acre.

Surely these four witnesses knew nothing about the property at the time of the timber location, or at the time of making the final proof. The only remaining witness produced by the Government in support of its charges was Mrs. Parker. It is upon her testimony and that alone that the Government can hope to support the judgment appealed from.

Mrs. Parker testified that she had no permanent home and that she lived with her daughters, and that at one time she *"lived upon a mine"* that was called the Parker mine; that was my husband's; he had it and I was up there with him". She says that was all the home they had and that she gave up everything and went up with him on the mine, and that he built the cabin himself "in Eldorado

County"; that she stayed there "most of eight years and more"; that *she does not remember the year when she left;* that Parker was sick, that it was "after the 1906 earthquake"; she says that they owned the mine at that time and all the time; she does not know who Parker bought the land from, but she thinks it was a man named Jones and young Mr. Meyer, and that he paid $1200 or $1300 for it. She says that they made their living from the mine for the eight years that they lived there, and had a good many hired men "because the ditch that he first dug broke before they got much out of it"; that a nephew of Parker's came up there and his own two boys, and they dug another ditch that went around another hill, but that it "did not bring them out as much as when they washed into the first canyon where they got the gold". She says that when they came back to the old place, in one or two days' washing they took out over $340, but *she does not state when this happened.* She says that Parker built the cabin for her to come up there; that it was a nice good cabin, with a cellar to put their provisions in, and that he dug a well and that they had a garden and that he bought a pump. She says her husband died three years ago last January, which would make the date of his death, January, 1913. Upon cross-examination she stated that they first went upon the property two or three years before the San Francisco fire, and then she says that Parker went there in 1902, which as a matter of fact would make it four years before the fire,

and that he dug most of the gold out *before the fire;* that "the first first he dug worked, it paid well". Just what is meant by this sentence it is difficult to determine, but we will assume that inasmuch as a ditch was referred to in the next sentence that she meant to say that the first *ditch* he dug paid well. She does not, however, say when that ditch was dug, but she does tell us that it broke, and that they then went to hydraulicking from the other ditch which they put in around the other hill, but she says "it did not pay them well". She also says, "he dug tunnels but he did not get any pay out of the tunnels"; that "it was out of the same ravine that this big lot of money was taken out at the foot of our canyon. He was hydraulicking in the bank of the creek"; that it was in the hydraulicking in the bank of the creek that he got the money. Presumably, the money referred to is the $340, of which she had spoken in her direct examination, which she says was taken out after the fire, but *she does not state how long after the fire.* She says there was a good deal of timber on the property, but not as much on the place where they got the gold; that there was good timber land near the cabin,—seven or eight big yellow pine trees—that Mr. Parker stayed there all the time, "he prospected", but that he left there *after the fire* as he was sick. How long after the fire this was she does not tell us.

We have now given the substance of all of Mrs. Parker's testimony, and we submit that there is

nothing there from which any court can determine that the property involved in this action was more valuable for its minerals than for its timber *in October of the year 1907.* It does appear that at one time while hydraulicking Parker got $340 worth of gold. It is more than likely, in fact quite evident from the testimony, that this was a mere pocket, such as miners often find in hydraulicking, and we have no evidence that any other pocket was at any other time discovered. Just when this was found we do not know, except that she tells it was after the fire, which was in April of 1906. As it was more than a year and a half after the fire that Robertson proved up on his timber claim, we submit that there is nothing in this evidence that even warrants a presumption that the property was valuable for minerals at the latter date, while all that the record shows is that the only gold that yielded tempting values may have been taken out a few days after the 18th of April, 1906, while all work done thereafter was done at a loss, and this is much more than likely from the fact that Mrs. Parker herself testified that all the time that Parker stayed there *he was prospecting;* like many another prospector, lured by the hope that he would again find ground that would pay like the pocket from which he got the $340, he toiled on, day in and day out, month in and month out, *in the hope* that he might find something of value, only to die later on of disappointment.

We now submit that the Government has not borne the burden cast upon it of showing, as the law required it to show, by "clear, unambiguous and convincing testimony" that this property to which the Government has issued a timber patent was at the time of the proof and grant more valuable for its minerals than for its timber.

In comparison with this uncertain and weak testimony of the Government, comes the strong and convincing testimony offered by the defendant Frick, who not only by his own evidence but that of his supporting witnesses, five in number, testified with the greatest particularity and certainty that at the time in question the land had practically no value for its minerals, but was valuable for its timber. It will be observed that none of these witnesses has been impeached, nor did the Government ever attempt to impeach them.

Mr. Frick testified that he was one of Robertson's proof witnesses in October, 1907, and that just prior to the giving of his testimony before the Government officials he went over the property; that he found the section corners; that he followed the section line and ran south on it and got down to the section next, the southwest corner of section 6, and that he came over the quarter stake on the south line of this section and ran north then to the quarter stake, taking in both sides of this property, the east and west sides; that he went through the property for the purpose of ascertaining whether it was timber land; *that he knows positively that this was not*

mining land, and that he knows in that section of the country *there are no paying mines;* that he, in connection with Mr. Mauk (the Government witness) tested that out in the immediate vicinity, and proved conclusively that there could be no mines developed, the land was timber land and covered with a good growth of timber, averaging in the neighborhood of 25,000 feet per acre; that the gulches *had been mined out in the early days* all through that section of the country by placer methods and by ground sluicing; that he paid Robertson $5 per acre for the land a short time after he got the title; that in 1902 he and Mr. Mauk had mined in that vicinity, but the mining proved a failure, he did not make any money out of it, and that he was satisfied at that time that there were *no minerals in that district in paying quantities;* that at the time that he gave his testimony as a proof witness he did not know that there was a house upon the property, or that there had been a shaft sunk, and that he did not know that Mr. Parker was living there, but so far as he knew, it was unoccupied; that there might have been a cabin in the gulch which he might not have seen, but there was no indication of deposits there, and no indications of value whatsoever that he saw; that at one time he and Mr. Mauk loaned a monitor and some pipe to Mr. Parker, but that *he did not know that it went on that property;* that Robertson knew that he, Frick, was in the timber business and that he purchased from Robertson nine or ten days after he

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made his final proof; that he met Robertson in Oakland the first time in the summer of 1906; that Robertson was then a real-estate dealer and offered to him some lands for sale; Robertson at that time was buying timber land as the agent of a Mr. Jacobi, and had an office in the same building in which Frick's office was, that Robertson asked him if he would act as a witness for him and he promised to do so as he knew the land and was familiar with that district; that there was no agreement or understanding between them at the time that he, Frick, should purchase the property. He surveyed that property in 1904, and at that time there were some abandoned cuts which they occasionally ran into, *such cuts as are found all through that timbered country, being marks of early day prospecting;* that he did not consider old abandoned mining cuts as evidence of any improvements; that if as a matter of fact he saw a cabin there at any time it must have been a good many years ago, and that he did not know whether he would pay any attention to it, as they were little old shacks all through the country used by old miners who prospected through that country; he says that Robertson came to him shortly after he made his proofs; that he was a sick man, his physician having stated that he had Bright's disease and could not live very long; that he then stated to him that he would like to have him buy that land, and he replied that it would depend a great deal upon what Robertson was willing to sell it for as he would probably have to hold it for sometime before

he could sell it; that Robertson replied that he did not know who he could sell it to unless Frick would buy it. Robinson finally made a price that was a sufficient inducement, and he bought it.

Dr. J. C. Anthony, testifying for the defendant stated that he knew Lee Parker, Sr., that he first met him in San Francisco sometime before the 1906 fire, and that he visited the land that he had in Eldorado County, where he claimed he had a mining claim with a Mr. Holbrook and Mr. Chappell; that they found there some prospecting holes, that the property had been represented to them as mining property and they agreed to purchase it if it was as represented, that they found nothing there to warrant the purchasing of the property, that Parker's son was there on the property and had a Little Giant at work there and was barely making a living. The samples and things that came through Mr. Chappell who remained on the property *did not show any values at all.* He says that *there was absolutely no earmarks of a mine anywhere,* that the only thing was the little sluicing he was doing down in a gulch. He says he was there in 1907, he thinks in the month of February. He stated upon cross-examination that he had been born and raised in mines, that his father was the original discoverer of copper on Lake Superior; that the boy (Parker's son) told him that he was barely making a living there—the witness did not see his clean-up. He tells us that there was a cabin there, with three rooms and a big fireplace; that there was another

cabin which had been built for another piece of property but not on this land—it was in a little depression there. The cabin was not more than 200 or 300 yards from where they were mining. He says that *the only thing of any value that they could see was what timber there was upon the land;* that there was some very good timber on it; that the only thing that was working there at the time of his visit in 1907 was the hydraulicking.

> "Q. Did you see any values there that attracted you at all, placer or otherwise?
> A. *None whatever.* We turned the property down flat. The land was not such as would warrant us in spending any money as miners in developing it. We went over all the property where he told us that there was any mining developments and did panning—there was no indication there, there was no lead, there was nothing there that any mining man would want. We brought samples back. I think we only panned in three places—all the places he showed us and that he claimed to be mining property. Those samples didn't show anything—a few cents—none of them went 50 cents a ton."

He says that it was the quartz that Parker laid so much stress upon, that he stated that he had property there that contained platinum, and he brought some samples down that Parker said there was platinum in, but there proved to be nothing in it. All this he stated was in the month of February, 1907.

Ezra Taylor, another witness produced by the defendant, testified that he was one of the proof

witnesses when Mr. Robertson got the property and had known it for twenty-five years, and had passed over it and mined around in that vicinity, and that he was last on the property in the year 1907, *about a week before Robertson proved up on it,* with Mr. Robertson; that there had been some mining done there, but he did not see anybody mining on it when he was over there.

"Q. Do you know whether there was anybody mining there
A. There was nobody mining there."

He says that it looked as if there had been a good deal of ground sluicing done; that there was one place there where they had worked a cut up there, and it had caused a landslide, which slid a lot of ground out, and from the looks of it the high water had washed it more and caused it to look like quite a bit of mining had been done there, but the cut was mostly from the slide. He stated that there was an old unoccupied mining cabin there but he did not go into it *and it did not look as if there was anybody in there;* said it was a small house and he *supposed it to be abandoned.* He said that he mined there in the mouth of that gulch; that one winter four of them worked there shoveling in sluice boxes; that *after working there a month they made $40,* and that he *never heard of any profitable mining being done around that neighborhood, not of late years;* that he supposed there had been in early days; that the ground sluicing he saw was done before 1907, and that the nearest paying mine was

forty miles distant, at Plymouth, and was known as the Plymouth Consolidated Mine. He also says that the land is very good timber land, having some sugar pine, some fir, some cedar and yellow pine. When asked how long prior to 1907 there had been ground sluicing done there, he says that he thinks 1906 was the last time they worked in there, but he was not positive; that he does not think there was any mining done there since 1907; that the land was more valuable for its timber than for mining; that he never noticed or saw any gravel there; that in going down upon the west side of the line one could not see the cabins; that you could not see them from the east side either, as there was too much timber; that you would have to get pretty close to them in order to see them on account of the timber; that the cabin is in a basin, and about it there was what they called "buck brush". He did not think that the cabins could have been seen from where the mining work had been done. He further stated that at the time he gave his testimony as a proof witness he regarded the improvements that he had seen upon the property *as abandoned improvements.* "You can go to almost any quarter section up there and you will find some cabin or house". He did not go into the house to see whether there were people living there; he never saw Parker working the mine; that he had been upon the property three or four times a year for twenty-five years; that he was riding after cattle through that country and during all that time he never saw Parker doing any mining.

Robert White, another witness called on behalf of the defendant, testified that he was familiar with the land about the year 1907 and before that time; that he lived on that same section and owned a forty acre lot there and had a homestead there since 1904 or 1905; that he saw Parker on that land about twelve years ago, namely, in 1906, and that he crossed the land several times during the summer each year. He says that there might have been a little mining done there in 1906, that Mr. and Mrs. Parker were living there in 1906, *during the summer time,* but he does not know that there was any one there in 1907; that there was a blind road which passed up above the house and one could not see the house from this road, but there was a trail from the road to the house.

Mr. Seymour Hill, one of defendant's witnesses, testified that his business was mining principally; that he examined the property in controversy on May 7, 1916, with regard to determining whether or not it was mining property; that he saw a hole, but could not say how deep, but from the dump he supposed perhaps 4 feet deep, or something like that, and another one a little further up the hill, perhaps 7 or 8 feet; that he looked for quartz, as they were evidently sunk for quartz; that there was a little quartz on the dump, blisters of quartz, and that he took some of the best looking rock he could see from each place and took them home and pounded them up to see, *and he didn't get anything out of them at all;* that a little further over, be-

tween the cabins and those holes, there was evidence of some surface mining; he thought at the head of where it had been sluiced out it was 150 feet wide, or perhaps a little longer; that he went down into those cuts and followed them down the creek that goes south from the river, until he was satisfied he was off of that ground; *that he did not see any quartz gravel, or, in fact, any kind of gravel at the upper end where they had been mining;* said it was just like a big washout that there will be in any of those granite mountains. In fact, he says *he did not see any evidence of anything that would make either a gravel or a quartz mine,* and that *in his opinion the land was not valuable for mining.* He said there was no evidence of any ledge there, and he saw no evidence of a mine, nor anything which would warrant a man in expending his money in developing it. He says that his impression was from what he saw, that there had been a little ravine, perhaps 8 or 10 feet wide, that at some time or other had gold in it, but that it had been washed out, and they followed it up into the mountain, where there was absolutely nothing. Those ravines, he says, occur in the country around about there; that the land showed no evidence of mining having been done upon it recently; that the shaft that was there had all caved in so that no one could go into it. He stated that there had been mining done there in the past.

Mr. Norris English, the last of defendant's witnesses regarding the matters now being considered,

testified that he was a mining engineer of large experience, having graduated from the University of California and pursued his profession ever since. He had spent considerable time in mining in the vicinity of the property in question, and made an expert examination of it on the 5th and 6th of May, 1916. Having described the character of the formation and the cuts and shafts, he spoke of a stringer of quartz which he measured, of which he took a sample, and had it assayed, but *it showed no values in gold or silver.* The first assay he said showed a trace in gold or silver amounting to about twenty cents a ton, which was a negligible valuation. Further down the slope, he says, the ditch runs on below that, about 2 or 3 feet in the section, and that at the bottom of the ground sluice there was an old windlass which was sunk down on a slip in the granite. This excavation he says did not show any gravel—it was merely an excavation in soil and decomposed bedrock. He says that the principal work on the property had been done about 200 feet south of the most westerly cabin, and consisted of a ground-sluice, or a sluice that had been carried up from the ravines 1000 feet or more down below the cabin up to within 40 or 50 feet of the ditch; that the upper part of the cut had been worked out by the use of a small giant, which took water out of the ditch, and which was connected by a string of eight inch pipe, there being some of that size on the ground. He says that this excavation in no place shows any gravel; that he

particularly examined the coarse rocks that had been piled out and thrown out of this trench, so as to give the water a chance to cut, and found no washed gravel, that the entire cut was in soil which was principally a decomposed lava, which makes a deep, red soil, and below that in decomposed granite. He says that on section 31, adjoining the property in question, and a quarter of a mile beyond the point where the ditch comes into this property, there had been a tunnel run and there was some quartz lying around the dumps, but this quartz only occurs in spots here and there; that there was no distinct ledge, and no continuous outcrop, and no indications that the ledge would become continuous in depth. He says that there was absolutely no gravel on the property, and that there was absolutely no indication that *would warrant a prudent man in making any expenditure there to develop a mining property;* that a man could not make anything from working that land in the way of profit in mining; that he had panned the sides of the principal cut in five different places in order to find out if the decomposed bedrock and soil carried any values, and he did not get any colors in any one of the five pans and he says he thinks anything that may have been there in the early days had been exhausted. He then says:

> "Around the principal ground sluice as to which I have testified, there are second growth pines that I suppose are anywhere from five to ten years old; they are an inch and an inch and a half in diameter. Further on down, in

> a place where the water from a spring runs, there are alders, about 4 inches in diameter, that have grown there since mining stopped. I don't think any mining had been done there inside of 10 years, except a little prospecting around with a pan. I think the shafts were sunk with the idea that the quartz would become larger and richer with depth, but there are no indications of any values of quartz on the surface, of any size that would make a mine. * * * I put in 12½ hours, and from my examination I could go back and read back for eight or ten years, *and say that no mineral of any consequence had been brought out of that ground.*"

We have now reviewed all of the testimony given by both plaintiff and defendant so far as the same relates to the character of the land in question, and we confidently submit that the testimony of the Government has failed to show that at the time of the final proof or of the issuance of the patent the land was more valuable for its minerals than for its timber, but that upon the contrary the evidence of the defendant shows conclusively that it had practically no value as mineral land, but had considerable value for its timber.

NO MERIT IN GOVERNMENT'S CASE.

In addition to what we have already stated, we now desire to call the court's attention to a defect in the testimony of the plaintiff, which, in our opinion, entirely strips the Government's cause of all merit. As we have already stated, the only evidence

upon which it is possible for it to hang the faintest glimmer of hope is that of Mrs. Parker, and we have shown that even she gave no testimony as to the character of the land in October, 1907, when the patent was issued. Not only is this true, but it is a remarkable circumstance that she gave *no evidence at all touching the particular land in question.* The only property regarding which she testified was described by her as "a mine" belonging to Mr. Parker, upon which they had a cabin, and which mine was known as the "Parker Mine". Unfortunately, the Government did not attempt to show that this Parker mine, upon which the cabin was located, and from which Mrs. Parker stated they obtained gold in the early days, *was any part of the property described in plaintiff's complaint.* Mrs. Parker says that this mine and cabin were in Eldorado County, and that she stayed there most of eight years, and that Parker subsequently got sick and they left. This was after the earthquake. Plaintiff's own evidence shows conclusively that Parker had located two other mining claims in Eldorado County, either of which might have been known as the "Parker mine" and might have been the one on which Mrs. Parker lived with her husband—one of these locations was made upon the 27th day of September, 1904, and was known as the "Lost Ledge Quartz claim" (see plaintiff's exhibit 12 page 9), and the property is described by stakes and monuments, no reference being made to Government subdivision, but it was

in Mount Pleasant mining district, Eldorado County. There is no possible way of identifying this property with the property described by the plaintiff. Another mine was located by Parker upon the 24th day of September, 1904, in the same district, but that appears to have been in Section 31, Township 9 North, Range 14 East, whereas the property described in plaintiff's complaint is in section 6, in the same township and range. This location is designated as "Lost Ledge" claim. This does not appear to be a relocation (Plaintiff's Exhibit 4).

It is true that Parker is described in the two locations which we have just described as Leondas Parker, whereas in the record he is spoken of as L. Parker, but when he filed his proof of labor upon each of these claims he signed his name as L. Parker (see plaintiff's exhibit 12, page 17). There can be no doubt, therefore, that Leondas Parker and L. Parker are the same person, and since these locations ante-dated Mrs. Parker's going up to Eldorado County to make a home upon "a mine" belonging to her husband, it is simply impossible for the court to determine whether the mine to which she refers, and upon which she lived, was the one described in plaintiff's complaint, or one of the other two locations referred to in the record, and since all presumptions of law must support the validity of the patent until the contrary, "by clear, convincing and unequivocal testimony" is established, it much follow that so far as Mrs.

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Parker's testimony is concerned the plaintiff's case as against the validity of the patent must fall.

If, however, the Government in reply shall say that Mrs. Parker's testimony shows that the claim upon which her cabin and the mine to which she refers was located was a purchased claim rather than a located claim, then the record is still against the Government, since she says that she thinks the claim was purchased from two persons, named Jones and Meyer, and the Government has failed to show in the record any connection between any property owned by Jones or Meyer and the property described in the complaint, whereas it does show that one G. W. Meyer and Oscar T. Jones together with several other persons located upon the 13th day of January, 1902, a large piece of mining ground in this same township, the size of which was 1320 feet in width, by 5280 feet in length (Plaintiff's Exhibit 12, page 2). This land, however, was in section 5, and not in section 6 described in the complaint. Furthermore the record contains the probate proceedings in the estate of Meyer, of which Jones was the administrator, and among the properties owned by Meyer is a large number of mining claims in this particular district. Since, then, the record does show that two men by the name of Jones and Meyer did own mining property in Eldorado County, from which Parker may have made his purchase, but which was located in an entirely different section than that here involved,

it follows that the claim referred to by Mrs. Parker upon which her husband mined and likewise the cabin may have been located in section 5 instead of section 6, and it was up to the Government, after having introduced this evidence, *to show to the contrary.* The burden of clearing up this ambiguity was not cast upon the defendant.

We submit, therefore, that the record fails to support the judgment obtained by the plaintiff, and as a further evidence of that fact we now desire to call the court's attention to

The Law of the Case.

It is settled law that where lands may have once profitably produced mineral values, and at that time were correctly classed as mineral, they lose their mineral character when they cease to pay, and that the question of mineral character is to be determined by the mineral value and workableness at the time of the grant, regardless of previous mining history.

Hunt v. Steese, 75 Cal. 624;
U. S. v. Central P. R. Co., 93 Fed. Rep. 873;
Colorado Coal and Iron Co. v. U. S., 123 U. S. 328;
Richards v. Dower, 81 Cal. 54;
Iron Silver Co. v. Mike & Starr Co., 143 U. S. 404;
Standard Quicksilver Co. v. Habishaw, 132 Cal. 123;
Davis v. Weibold, 139 U. S. 522.

The mere fact that Robertson and his witnesses did not see the mining improvements put upon the property by Parker did not of itself constitute fraud, or warrant the court in setting aside the patent.

Chormicle v. Hiller, 26 L. D. 9;
Andrew v. Stuart, 26 L. D. 265.

Abandoned cabins, houses, clearing, or other improvements of settlers who once occupied public land and afterwards left it, cannot be considered a possession or occupancy which excludes such land from selection under the mining act.

Smelting Co. v. Kemp, 104 U. S. 655;
Andrew v. Stuart, supra;
Miller v. McMillan, 10 L. Ed. 160;
Ward v. Fitzpatrick, 14 L. D. 415.

A mere preponderance of evidence which leaves the issue in doubt will not be sufficient to support a judgment cancelling a patent.

U. S. v. Budd, U. S. 36 L. Ed. 386.

The mere fact that Frick bought the property in question from Robertson a few days after he obtained his patent is not in itself any evidence of collusion, conspiracy or fraud. As the court stated in the last case cited above:

> "The Act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the Government, or restrict in the slightest his power of alienation. All that it denounces *is a prior agreement,* the acting for another in the purchase. If when the title passes from the Government no one save

> the purchaser has any claim upon it, or any contract or agreement for it, the Act is satisfied."

The Government in the case at bar did not attempt to show that there was any agreement between Robertson and Frick which was made prior to the obtainment of the patent, or that the patent was obtained by Robertson for the benefit of any one but himself.

The record shows that young Parker a son of L. Parker and of Ellen Parker worked upon the ground with his father, at least for a portion of the time that the father was there. If any one could have given satisfactory testimony with reference to the character of the land and its mineral value young Parker would seem to be that one. The Government failed to call him, nor did it give any reason why it so failed, and the presumption must therefore be that if he had been called his testimony would have been unsatisfactory.

U. S. v. Budd, supra.

The question of the mineral and timber values of the property here involved was properly presented to the Register at the time of the application for the patent, and it must be presumed that from the testimony submitted, in the absence of fraud, the judgment of the Register and of the Land Department of the Government was right. As was said in the Budd case above cited:

> "In the absence of fraud, or some other element to involve the jurisdiction and powers of a court of equity, the determination of the land

officers as to the fact whether the given tract is or is not fit for cultivation is conclusive."

We trust the court will not lose sight of the fact that notice of the application for the patent was duly posted in the office of the Register, and *also published for more than two months* in a newspaper circulated in Eldorado County, nearest to the land. This is shown by the record. Notwithstanding these notices so posted and published, no one appeared at the office of the Register to oppose the granting of Robertson's application. Surely, if Mr. Parker, or anyone else, at that time knew that the land was more valuable for minerals than for timber, or that he had any prior rights, then it was his duty to appear at the Register's office and show cause why the application should not be granted. This he did not do. A fair inferrence from Parker's failure to appear and object to the issuance of the patent would be, that he had either abandoned the premises and gone elsewhere, or that he did not regard the land of sufficient value for mining purposes to warrant his objecting.

We have a further objection to this judgment to which we now call the court's attention. It appears that the land described in the complaint aggregated about 200 acres. Just where, upon this land, if anywhere, Parker did his mining we do not know. Surely, as there is no evidence that there was more than one claim, he could not have covered the entire ground. What portion of it he worked in the early days we are not told. The judgment

of the court awarded damages at the rate of $35 per acre *for the entire tract,* that being the price which Frick obtained for it in the sale to the California Door Company in May, 1911, *nearly three and one-half years after the patent was issued.* If in any view of the case the Government was entitled to a money judgment against Frick, it should only have been for that portion of the land which was more valuable for its minerals than for its timber *at the time of the grant,* not years afterwards. Furthermore it should have been for only about twenty acres of ground, which is about one-tenth of the total amount described in the complaint. As to the balance of the land, or nine-tenths, the Government offered no testimony to show that it was mineral land, whereas the defendant's testimony clearly showed that *all of the land* was timber land. If the Government suffered any damage by reason of any wrong done by Robertson or Frick it was not a damage to any other than the twenty acres covered by the mining location, and this damage must be measured by its value in 1907, not in 1911. For this land Frick received $35 per acre, and in no view of the case would the government be entitled to any more than Frick got *for that particular piece* which would not amount to more than about $700. As to the balance of the land, it being timber land, the Government has already received its full value and hence has suffered no damage. In calling the court's attention to this phase of the case, we do not desire to be deemed as waiving our objection to any damage judgment whatsoever.

By the Act of March 2, 1896 (29 Stat. 42, 43), it is provided that the amount that may be recovered as damages by the Government in an action of deceit for the conversion of lands obtained by fraudulent entry is limited to the minimum Government price of the lands. Any possible recovery therefor would be the actual damage limited by that valuation. In other words, the Statute has declared that the Government in such cases is never damaged more than the Government price of the land. As here the Government has received its price upon issuing its patent, it cannot be damaged in an amount above that price, and now has no money claim against the defendant Frick in any event or upon any theory.

Southern Pacific v. United States, 200 U. S. 353.

Again let us suppose that the case at bar was properly on the law side of the court, and that the bill filed had been properly framed for an action of deceit and duly answered and that the trial which has taken place was had accordingly. We come then to a consideration of the proposition whether or not the Government has made a case for damages for fraud. It is elementary, of course, that to make such a case, the plaintiff must plead:

> "(1) That defendant made a material representation; (2) That it was false; (3) That when he made it, he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) That he made it with the intention that it should be

acted upon by plaintiff; (5) That plaintiff acted in reliance upon it; and (6) That he thereby suffered injury."

20 Cyc. of Law and Procedure 13.

"Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery."

Cyc., supra.

"While there is no definite standard by which to determine whether a fraudulent misrepresentation is material, a working rule has been laid down as follows:

If the misrepresentation be such that had it not been made the transaction would not have been entered into or completed, then it is material; but if it be shown or made probable that the same thing would have been done in the same way if the misrepresentation had not been made, it cannot be deemed material."

20 Cyc. of Law and Procedure 23.

Not only has the Government fallen far short of either pleading or proving all of the facts necessary to such a case, but it has failed in every single particular.

The representations charged against the entryman and defendant Frick are that he said the land was not mineral land and had no improvements on it. The first of these respresentations was true, and the second, if not literally was practically true and was immaterial. But even if these representations were false, there is not a particle of evidence to show that the entryman or Frick knew them to be false, and they plainly were not recklessly made,

for it was quite reasonable for anyone to consider the land non-mineral, or to have failed to notice the so-called mining improvements, or to have disregarded them as improvements, because they were abandoned. Furthermore, the Government has suffered no injury, because, the land, if non-mineral, brought its full and fair price, and the Government's valuation was met to the last dollar.

All the presumptions are of innocence, of honest purpose and truthful representations by the entryman and his witnesses, of belief in the truth of statements made, and of unconscious mistake, where mistakes were made. All these presumptions stand steadfastly to the support of a defendant in an action of deceit until dispelled by proof, which proof, as we have seen, must be "clear, unequivocal and convincing". All these presumptions still stand protectingly about this defendant—the Government has not demolished a single one of them, nor, indeed, made any serious attempt to do so.

Boddy v. Henry, 113 Iowa 462; 85 N. W. 771;
Ley v. Met. Life Ins. Co., 120 Iowa 203; 94 N. W. 568;
Lovelace v. Suher, 93 Mo. App. 429; 67 S. W. 737;
Brackett v. Griswold, 112 N. Y. 454; 20 N. E. 376;
Holdom v. Ayer, 110 Ill. 448;
Warfield v. Clark, 118 Iowa 69; 91 N. W. 833;
Lamberton v. Dunham, 165 Pa. St. 129; 30 Atl. 716;
Toner v. Meusdorffer, 123 Cal. 462.

In conclusion we respectfully submit that the judgment of the District Court should be reversed.

Dated, San Francisco,
November 20, 1918.

JORDAN & BRANN,
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